

104  
**JOB CREATION AND WAGE ENHANCEMENT ACT  
OF 1995**

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4. J 89/1:104/3

Job Creation and Wage Enhancement A...

**HEARINGS**  
BEFORE THE  
SUBCOMMITTEE ON  
COMMERCIAL AND ADMINISTRATIVE LAW  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

**H.R. 9 (Titles VI, VII, and VIII)**

JOB CREATION AND WAGE ENHANCEMENT ACT OF 1995

FEBRUARY 3 AND 6, 1995

**Serial No. 3**



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# **JOB CREATION AND WAGE ENHANCEMENT ACT OF 1995**

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**FRIDAY, FEBRUARY 3, 1995**

**HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON COMMERCIAL AND  
ADMINISTRATIVE LAW,  
COMMITTEE ON THE JUDICIARY,  
Washington, DC.**

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2226, Rayburn House Office Building, Hon. George W. Gekas (chairman of the subcommittee) presiding.

Present: Representatives George W. Gekas, Steve Chabot, Michael Patrick Flanagan, Bob Barr, John Bryant of Texas, John Conyers, Jr., Jack Reed, and Jerrold Nadler.

Subcommittee staff present: Raymond V. Smietanka, counsel; Charles E. Kern III, counsel; Roger T. Fleming, counsel; and Susana Gutierrez, secretary; full committee staff present: Agnieszka Fryszman, minority counsel; Perry Apelbaum, minority counsel; and Paul J. Drolet, minority counsel.

## **OPENING STATEMENT OF CHAIRMAN GEKAS**

Mr. GEKAS. The hour of 9:30 having arrived, the meeting of the subcommittee will come to order. We will now recess until a quorum appears.

For the benefit of the audience, I am intent on beginning every meeting under our jurisdiction on time. I just did. And now we will enjoy a recess.

[Recess.]

Mr. GEKAS. The time of the recess having expired and noticing a quorum in the person of the distinguished gentleman from Rhode Island, Mr. Reed, who has been designated as the ranking member to serve on this subcommittee. We will now begin the function of the subcommittee.

The subject matter for today is H.R. 9, which has abundant co-sponsors and which would create jobs, enhance wages, strengthen property rights, maintain certain economic liberties, decentralize and reduce the power of the Federal Government with respect to the States, and citizens of the United States; and increase the accountability of Federal officials.

It is the responsibility of this subcommittee to determine the best features and other options to titles VI, VII, and VIII. The witnesses at this hearing will be concentrating on the relevant portions of those titles.



This morning's session will be comprised of an exposition on title VI and later in the morning on title VIII. We will leave the meat of the sandwich, title VII, until Monday at 2 p.m.. When we have completed the process, we will have gone a long way in raising the visibility of this complex problem.

It is no secret to any American involved in the workplace that regulations are the subject of controversy, burden, and sometimes opportunity. But most of the time, regulations are a hindrance to freedom to conduct the workplace efficiently, economically, and productively. We aim to elicit from the witnesses the pros and cons of the various phases and how best we can deal with regulatory flexibility or nonflexibility wherever it may apply.

The important thing to remember in all of this is that the Contract With America, which is propelling the majority in this field and others has as one of its main tenets the oversight into the regulatory problem. So, it will be no secret, either to the majority members of this subcommittee or the minority members, that we on the majority side intend to blend this hearing and its overall function—regulatory flexibility—into the Contract With America. That does not mean that H.R. 9, and those relevant titles, will remain intact because they will be subject to the normal legislative process that will occur in this subcommittee and in the full Judiciary Committee.

[The bill, H.R. 9 (titles VI, VII, and VIII), follows:]

104TH CONGRESS  
1ST SESSION

# H. R. 9

To create jobs, enhance wages, strengthen property rights, maintain certain economic liberties, decentralize and reduce the power of the Federal Government with respect to the States, localities, and citizens of the United States, and to increase the accountability of Federal officials.

## IN THE HOUSE OF REPRESENTATIVES

JANUARY 4, 1995

Mr. ARCHER, Mr. DELAY, Mr. SAXTON, Mrs. SMITH of Washington, and Mr. TAUZIN (for themselves, Mr. HASTERT, Mr. DORNAN, Mr. ROHRBACHER, Mr. BLUTE, Mr. SMITH of Texas, Mr. LINDER, Mr. KIM, Mr. MICA, Mr. BACHUS, Ms. DANNER, Mr. HOKE, Mr. CLINGER, Mr. BALLENGER, Mr. CALLAHAN, Mr. SHAW, Mr. NUSSLE, Mr. LARGENT, Mr. COX, Mr. STOCKMAN, Mr. SMITH of Michigan, Mr. BAKER of California, Mr. HERGER, Mr. HEINEMAN, Mrs. FOWLER, Mr. SENSENBRENNER, Mr. STEARNS, Mr. HUTCHINSON, Mr. HANCOCK, Mr. TALENT, Mr. EMERSON, Mr. ENGLISH of Pennsylvania, Mr. ENSIGN, Mr. HOSTETTLER, Mr. JONES, Mr. TIAHRT, Mrs. MYRICK, Mr. EWING, Mr. HOUGHTON, Mrs. CUBIN, Mr. KINGSTON, Mr. HASTINGS of Washington, Mr. GANSKE, Mr. SCHAEFER, Mr. BAKER of Louisiana, Mr. HALL of Texas, Mr. WELDON of Florida, Mr. COBURN, Mr. WELLER, Mr. LEWIS of Kentucky, Mr. BUNNING of Kentucky, Mr. FOLEY, Mr. INGLIS of South Carolina, Mr. LIGHTFOOT, Mr. ISTOOK, Mr. CALVERT, Mr. HOBSON, Mr. KNOLLENBERG, Mr. BILIRAKIS, Mr. HAYWORTH, Mr. FOX, Mr. RADANOVICH, Mr. ROTH, Mr. WAMP, Mr. SOLOMON, Mr. BLILEY, Mr. DOOLITTLE, Mr. PACKARD, Mr. GILMAN, Mr. MILLER of Florida, Mr. ROYCE, Mr. FLANAGAN, Mr. LATHAM, Ms. MOLINARI, Mr. GUNDERSON, Mr. THORNBERRY, Mr. RIGGS, Mr. ALLARD, Mr. CHRISTENSEN, Mr. GOODLATTE, Mr. SANFORD, Mr. HILLEARY, Mr. COOLEY, Mr. WICKER, Mr. BONO, Mr. FRISA, Mr. MCINTOSH, Mr. EVERETT, Mr. SMITH of New Jersey, Mr. SHADEGG, Mrs. JOHNSON of Connecticut, Mr. CHRYSLER, Mr. CUNNINGHAM, Mr. CANADY, Mr. MCCOLLUM, Mr. GOODLING, Mr. BARTON of Texas, Mr. BARR, Mr. ARMEY, Mr. FORBES, Mrs. WALDHOLTZ, Mr. TATE, Ms. DUNN, Mr. MCHUGH, Mr. CRAPO, Mr. KOLBE, Mr. PAXON, Mr. YOUNG of Florida, Mr. COMBEST, Mr. COBLE, Mr. EHRLICH, and Mrs. MEYERS of Kansas) introduced the following bill; which was referred as follows:

Titles I-II, referred to the Committee on Ways and Means

Title III, referred to the Committee on Science and, in addition, to the Com-



mittees on Commerce and Government Reform and Oversight, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

Title IV, referred to the Committee on the Budget and, in addition, to the Committees on Rules, Government Reform and Oversight, and the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

Title V, referred to the Committee on Government Reform and Oversight

Title VI–IX, referred to the Committee on the Judiciary

Title X, referred to the Committee on the Budget and, in addition, to the Committees on Government Reform and Oversight, Rules, and the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

Title XI, referred to the Committee on Ways and Means and, in addition, to the Committee on the Budget, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

Title XII, referred to the Committee on Ways and Means

---

## A BILL

To create jobs, enhance wages, strengthen property rights, maintain certain economic liberties, decentralize and reduce the power of the Federal Government with respect to the States, localities, and citizens of the United States, and to increase the accountability of Federal officials.

1 *Be it enacted by the Senate and House of Representa-*  
 2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Job Creation and  
 5 Wage Enhancement Act of 1995”.

6 **SEC. 2. TABLE OF CONTENTS.**

7 The table of contents for this Act is as follows:

Sec. 1. Short title.

Sec. 2. Table of contents.

#### TITLE I—CAPITAL GAINS REFORM

Sec. 1001. 50 percent capital gains deduction.

Sec. 1002. Indexing of certain assets for purposes of determining gain or loss.

Sec. 1003. Capital loss deduction allowed with respect to sale or exchange of principal residence.

#### TITLE II—NEUTRAL COST RECOVERY

Sec. 2001. Depreciation adjustment for certain property placed in service after December 31, 1994.

#### TITLE III—RISK ASSESSMENT AND COST/BENEFIT ANALYSIS FOR NEW REGULATIONS

Sec. 3001. Findings

##### Subtitle A—Risk Assessment and Communication

Sec. 3101. Short title.

Sec. 3102. Purposes.

Sec. 3103. Effective date; applicability; savings provisions.

Sec. 3104. Principles for risk assessment.

Sec. 3105. Principles for risk characterization and communication.

Sec. 3106. Guidelines, plan for assessing new information, and report.

Sec. 3107. Definitions.

##### Subtitle B—Analysis of Risk Reduction Benefits and Costs

Sec. 3201. Analysis of risk reduction benefits and costs.

##### Subtitle C—Peer Review

Sec. 3301. Peer review program.

#### TITLE IV—ESTABLISHMENT OF FEDERAL REGULATORY BUDGET COST CONTROL

Sec. 4001. Amendments to the Congressional Budget Act of 1974.

Sec. 4002. President's annual budget submissions.

Sec. 4003. Estimation and disclosure of costs of Federal regulation.

#### TITLE V—STRENGTHENING OF PAPERWORK REDUCTION ACT

Sec. 5001. Short title.

##### Subtitle A—Authorization of Appropriations

Sec. 5101. Authorization of appropriations.

##### Subtitle B—Reducing the Burden of Federal Paperwork on the Public

Sec. 5201. Coverage of all federally sponsored paperwork burdens.

Sec. 5202. Paperwork reduction goals.

##### Subtitle C—Enhancing Government Responsibility and Accountability for Reducing the Burden of Federal Paperwork

- Sec. 5301. Reemphasizing the responsibility of the Director to control the burden of Federal paperwork.
- Sec. 5302. Enhancing agency responsibility to obtain public review of proposed paperwork burdens.
- Sec. 5303. Expediting review at the Office of Management and Budget.
- Sec. 5304. Improving public and agency scrutiny of paperwork burdens proposed for renewal.
- Sec. 5305. Protection for whistleblowers of unauthorized paperwork burden.
- Sec. 5306. Enhancing public participation.
- Sec. 5307. Expediting review of an agency information collection request with a reduced burden.

#### Subtitle D—Enhancing Agency Responsibility for Sharing and Disseminating Public Information

- Sec. 5401. Prescribing governmentwide standards for sharing and disseminating public information.
- Sec. 5402. Agency responsibilities for sharing and disseminating public information.
- Sec. 5403. Agency information inventory/locator system.

#### Subtitle E—Additional Government Information Management Responsibility

- Sec. 5501. Strengthening the statistical policy and coordination functions of the Director.
- Sec. 5502. Use of electronic information collection and dissemination techniques to reduce burden.
- Sec. 5503. Agency implementation.
- Sec. 5504. Automatic data processing equipment plan.
- Sec. 5505. Technical and conforming amendments.

#### Subtitle F—Effective Dates

- Sec. 5601. Effective dates.

### TITLE VI—STRENGTHENING REGULATORY FLEXIBILITY

- Sec. 6001. Judicial review.
- Sec. 6002. Consideration of direct and indirect effects of rules.
- Sec. 6003. Rules opposed by SBA Chief Counsel for Advocacy.
- Sec. 6004. Sense of Congress regarding SBA Chief Counsel for Advocacy.

### TITLE VII—REGULATORY IMPACT ANALYSES

- Sec. 7001. Short title.
- Sec. 7002. Rule making notices for major rules.
- Sec. 7003. Hearing requirement for proposed rules; extension of comment period.
- Sec. 7004. Regulatory impact analysis.
- Sec. 7005. Additional responsibilities of Director of the Office of Management and Budget.
- Sec. 7006. Standard of clarity.
- Sec. 7007. Report by OIRA.
- Sec. 7008. Definitions.

### TITLE VIII—PROTECTION AGAINST FEDERAL REGULATORY ABUSE

### Subtitle A—Citizens' Regulatory Bill of Rights

Sec. 8101. Citizens' regulatory bill of rights.

### Subtitle B—Private Sector Whistleblowers' Protection

Sec. 8201. Short title.

Sec. 8202. Purpose.

Sec. 8203. Coverage.

Sec. 8204. Prohibited regulatory practices.

Sec. 8205. Prohibited regulatory practice as a defense to agency action.

Sec. 8206. Enforcement.

Sec. 8207. Citizen suits.

Sec. 8208. Office of the Special Counsel.

Sec. 8209. Relation to criminal investigations.

## TITLE IX—PRIVATE PROPERTY RIGHTS PROTECTIONS AND COMPENSATION

Sec. 9001. Statement of purpose.

Sec. 9002. Compensation for Federal agency infringement or deprivation of rights to private property.

Sec. 9003. Severability.

Sec. 9004. Definitions.

## TITLE X—ESTABLISHMENT OF FEDERAL MANDATE BUDGET COST CONTROL

Sec. 10001. Amendments to the Congressional Budget Act of 1974.

Sec. 10002. President's annual budget submissions.

Sec. 10003. Estimation and disclosure of costs of Federal mandates.

## TITLE XI—TAXPAYER DEBT BUY-DOWN

Sec. 11001. Designation of amounts for reduction of public debt.

Sec. 11002. Public Debt Reduction Trust Fund.

Sec. 11003. Taxpayer-generated sequestration of Federal spending to reduce the public debt.

## TITLE XII—SMALL BUSINESS INCENTIVES

Sec. 12001. Increase in unified estate and gift tax credits.

Sec. 12002. Increase in expense treatment for small businesses.

Sec. 12003. Clarification of definition of principal place of business.

Sec. 12004. Treatment of storage of product samples.

9 **TITLE VI—STRENGTHENING**  
10 **REGULATORY FLEXIBILITY**

11 **SEC. 6001. JUDICIAL REVIEW.**

12 (a) IN GENERAL.—Section 611 of title 5, United  
13 States Code, is repealed.

14 (b) CONFORMING AMENDMENT.—The table of sec-  
15 tions at the beginning of chapter 6 of title 5, United  
16 States Code, is amended by striking the item relating to  
17 section 611.

18 **SEC. 6002. CONSIDERATION OF DIRECT AND INDIRECT EF-**  
19 **FFECTS OF RULES.**

20 (a) IN GENERAL.—Title 5, United States Code, is  
21 amended by inserting after section 610 the following new  
22 section:

1       ments of sections 110 and 111 of the Federal Prop-  
2       erty and Administrative Services Act of 1949 (40  
3       U.S.C. 757 and 759) and the purposes of this  
4       chapter;”.

5   **SEC. 5505. TECHNICAL AND CONFORMING AMENDMENTS.**

6       (a) DEFINITIONS.—Section 3502(10) of title 44,  
7       United States Code, is amended by striking out “the Fed-  
8       eral Housing Finance Board” and inserting in lieu thereof  
9       “Federal Housing Finance Board”.

10      (b) REVIEW PERIODS.—Section 3507(g)(1) of title  
11      44, United States Code, is amended to read as follows:  
12      “(1) is needed prior to the expiration of the time periods  
13      for public notice and review by the Director pursuant to  
14      the requirements of this chapter;”.

15      (c) DIRECTOR REVIEW.—Section 3513(a) of title 44,  
16      United States Code, is amended in the first sentence by  
17      inserting “resources” after “information”.

18      (d) RESPONSIVENESS.—Section 3514(a) of title 44,  
19      United States Code, is amended—

20           (1) in paragraph (9)(A) by inserting “and” at  
21           the end thereof;

22           (2) in paragraph (9)(B) by striking out the  
23           semicolon and inserting a period; and

24           (3) by striking out paragraph (9)(C).

1 **“§ 611. Consideration of direct and indirect effects of**  
 2 **rules**

3 “In determining under this chapter whether or not  
 4 a rule is likely to have a significant impact on a substan-  
 5 tial number of small entities, an agency shall consider both  
 6 the direct and indirect effects of the rule.”.

7 (b) CONFORMING AMENDMENT.—The table of sec-  
 8 tions at the beginning of chapter 6 of title 5, United  
 9 States Code, is amended by inserting after the item relat-  
 10 ing to section 610 the following:

“611. Consideration of direct and indirect effects of rules.”.

11 **SEC. 6003. RULES OPPOSED BY SBA CHIEF COUNSEL FOR**  
 12 **ADVOCACY.**

13 (a) IN GENERAL.—Section 612 of title 5, United  
 14 States Code, is amended by adding at the end the follow-  
 15 ing new subsection:

16 “(d) STATEMENT OF OPPOSITION.—

17 “(1) TRANSMITTAL OF PROPOSED RULES AND  
 18 INITIAL REGULATORY FLEXIBILITY ANALYSIS TO  
 19 SBA CHIEF COUNSEL FOR ADVOCACY.—On or before  
 20 the 30th day preceding the date of publication by an  
 21 agency of general notice of proposed rulemaking for  
 22 a rule, the agency shall transmit to the Chief Coun-  
 23 sel for Advocacy of the Small Business Administra-  
 24 tion—

25 “(A) a copy of the proposed rule; and



1           “(B)(i) a copy of the initial regulatory  
2           flexibility analysis for the rule if required under  
3           section 603; or

4           “(ii) a determination by the agency that an  
5           initial regulatory flexibility analysis is not re-  
6           quired for the proposed rule under section 603  
7           and an explanation for the determination.

8           “(2) STATEMENT OF OPPOSITION.—On or be-  
9           fore the 15th day following receipt of a proposed  
10          rule and initial regulatory flexibility analysis from an  
11          agency under paragraph (1), the Chief Counsel for  
12          Advocacy may transmit to the agency a written  
13          statement of opposition of the proposed rule.

14          “(3) RESPONSE.—If the Chief Counsel for Ad-  
15          vocacy transmits to an agency a statement of opposi-  
16          tion to a proposed rule in accordance with para-  
17          graph (2), the agency shall publish the statement,  
18          together with the response of the agency to the  
19          statement, in the Federal Register at the time of  
20          publication of general notice of proposed rulemaking  
21          for the rule.”.

22          (b) CONFORMING AMENDMENT.—Section 603(a) of  
23          title 5, United States Code, is amended by inserting “in  
24          accordance with section 612(d)” before the period at the  
25          end of the last sentence.

1 **SEC. 6004. SENSE OF CONGRESS REGARDING SBA CHIEF**  
 2 **COUNSEL FOR ADVOCACY.**

3 It is the sense of Congress that the Chief Counsel  
 4 for Advocacy of the Small Business Administration should  
 5 be permitted to appear as amicus curiae in any action or  
 6 case brought in a court of the United States for the pur-  
 7 pose of reviewing a rule.

8 **TITLE VII—REGULATORY**  
 9 **IMPACT ANALYSES**

10 **SEC. 7001. SHORT TITLE.**

11 This title may be cited as the “Administrative Proce-  
 12 dure Reform Act of 1995”.

13 **SEC. 7002. RULE MAKING NOTICES FOR MAJOR RULES.**

14 Section 553 of title 5, United States Code, is amend-  
 15 ed by adding at the end the following:

16 “(f)(1)(A) The head of an agency shall publish in the  
 17 Federal Register, at least 90 days before the date of publi-  
 18 cation of general notice under subsection (b) for a pro-  
 19 posed major rule, a notice of intent to engage in rule mak-  
 20 ing.

21 “(B) A notice under subparagraph (A) for a proposed  
 22 major rule shall include, to the extent possible, the infor-  
 23 mation required to be included in a Regulatory Impact  
 24 Analysis for the rule under section 7004(e) (1), (2), and  
 25 (8) of the Administrative Procedure Reform Act of 1995.

1       “(2) The head of an agency shall include in a general  
2 notice under subsection (b) for a major rule proposed by  
3 the agency—

4           “(A) a final Regulatory Impact Analysis for the  
5 rule prepared in accordance with section 7004 of the  
6 Administrative Procedure Reform Act of 1995; and

7           “(B) clear delineation of all changes in the in-  
8 formation included in the final Regulatory Impact  
9 Analysis under section 7004(c)(1) and (2) of the Ad-  
10 ministrative Procedure Reform Act of 1995 from  
11 any such information that was included in the notice  
12 for the rule under paragraph (1)(B) of this sub-  
13 section.

14       “(3) In this subsection, the term ‘major rule’ has the  
15 meaning given that term in section 7004(b) of the Admin-  
16 istrative Procedure Reform Act of 1995.”.

17 **SEC. 7003. HEARING REQUIREMENT FOR PROPOSED**  
18 **RULES; EXTENSION OF COMMENT PERIOD.**

19       (a) HEARING REQUIREMENT.—Section 553 of title 5,  
20 United States Code, is further amended—

21           (1) in subsection (b), in the matter following  
22 paragraph (3), by inserting “(except subsection  
23 (g))” after “this subsection”; and

24           (2) by adding after subsection (f) (as added by  
25 section 7002 of this title) the following:

1       “(g) If more than 100 interested persons acting indi-  
2 vidually submit comments to an agency regarding any rule  
3 proposed by the agency, the agency shall hold a public  
4 hearing on the proposed rule.”.

5       (b) EXTENSION OF COMMENT PERIOD.—Section 553  
6 of title 5, United States Code, is further amended by add-  
7 ing after subsection (g) (as added by subsection (a)(2) of  
8 this section) the following:

9       “(h) If during the 30-day period beginning on the  
10 date of publication of notice under subsection (f)(1)(A) for  
11 a proposed major rule, or if during the 30-day period be-  
12 ginning on the date of publication or service of notice re-  
13 quired by subsection (b) for a proposed rule, more than  
14 100 persons individually contact the agency to request an  
15 extension of the period for making submissions under sub-  
16 section (c) pursuant to the notice, the agency—

17       “(1) shall provide an additional 30-day period  
18 for making those submissions; and

19       “(2) may not adopt the rule until after that ad-  
20 ditional period.”.

21       (c) RESPONSE TO COMMENTS.—Section 553(c) of  
22 title 5, United States Code, is amended—

23       (1) by inserting “(1)” after “(c)”; and

24       (2) by adding at the end the following:

1       “(2) The head of an agency shall publish in the Fed-  
2 eral Register with each rule published under section  
3 552(a)(1)(D) of this title, responses to the substance of  
4 the comments received by the agency regarding the rule.”.

5 **SEC. 7004. REGULATORY IMPACT ANALYSIS.**

6       (a) APPLICATION OF EXECUTIVE ORDER AS STATU-  
7 TORY REQUIREMENT.—Except as otherwise provided in  
8 this section, Executive Order 12291 (relating to Federal  
9 regulation requirements and regulatory impact analysis),  
10 as in effect on September 29, 1993, shall apply to each  
11 agency in accordance with the provisions of the Order.

12       (b) DEFINITION OF MAJOR RULE IN ORDER.—Not-  
13 withstanding section 1(b) of the Order, for purposes of  
14 subsection (a) of this section, the term “major rule”  
15 means any proposed rulemaking—

16               (1) which affects more than 100 persons; or

17               (2) compliance with which will require the ex-  
18 penditure of more than \$1,000,000 by any single  
19 person which is not a Federal agency.

20       (c) CONTENTS OF REGULATORY IMPACT ANALY-  
21 SES.—In lieu of the information specified in section 3(d)  
22 of the Order, each preliminary and final Regulatory Im-  
23 pact Analysis required under section 3 of the Order for  
24 a rule shall contain the following:

1           (1) An explanation of the necessity, appro-  
2           priateness and reasonableness of the rule.

3           (2) A description of the current condition that  
4           the rule will address and how that condition will be  
5           affected by the rule.

6           (3) A statement that the rule does not conflict  
7           with nor duplicate any other rule, or an explanation  
8           of why the conflict or duplication exists.

9           (4) A statement of whether the rule is in accord  
10          with or in conflict with any legal precedent.

11          (5) A statement of the factual, scientific, or  
12          technical basis for the agency's determination that  
13          the rule will accomplish its intended purpose.

14          (6) A statement that describes and, to the ex-  
15          tent practicable, quantifies the risks to human  
16          health or the environment to be addressed by the  
17          rule.

18          (7) A demonstration that the rule provides the  
19          least costly or least intrusive approach for meeting  
20          its intended purpose.

21          (8) A description of any alternative approaches  
22          considered by the agency or suggested by interested  
23          persons and the reasons for their rejection.

24          (9) An estimate of the nature and number of  
25          persons to be regulated or affected by the rule.



1           (10) An estimate of the economic costs of the  
2 rule, including those incurred by persons in comply-  
3 ing with the rule.

4           (11) An evaluation of the costs versus the bene-  
5 fits derived from the rule, including evaluation of  
6 how those benefits outweigh the cost.

7           (12) Whether the rule will require onsite inspec-  
8 tions.

9           (13) An estimate of the paperwork burden on  
10 persons regulated or affected by the rule, such as  
11 the number of forms, impact statements, surveys,  
12 and other documents required to be completed by  
13 the person under the rule.

14           (14) Whether persons will be required by the  
15 rule to maintain any records which will be subject to  
16 inspection.

17           (15) Whether persons will be required by the  
18 rule to obtain licenses, permits, or other certifi-  
19 cations, and the fees and fines associated therewith.

20           (16) Whether persons will be required by the  
21 rule to appear before the agency.

22           (17) Whether persons will be required by the  
23 rule to disclose information on materials or proc-  
24 esses, including trade secrets.



1           (18) Whether persons will be required by the  
2 rule to report any particular type of incidents.

3           (19) Whether persons will be required by the  
4 rule to adhere to design or performance standards.

5           (20) Whether persons may need to retain or  
6 utilize any lawyer, accountant, engineer, or other  
7 professional consultant in order to comply with the  
8 regulations.

9           (21) An estimate of the costs to the agency for  
10 implementation and enforcement of the regulations.

11           (22) Whether the agency can be reasonably ex-  
12 pected to implement the rule with the current level  
13 of appropriations.

14           (23) A statement that any person may submit  
15 comments on the Regulatory Impact Analysis to the  
16 Administrator of the Office of Information and Reg-  
17 ulatory Affairs.

18       The requirements of this section shall be consistent  
19 with, and not duplicative of, the requirements of section  
20 3201.

21       (d) DEFINITIONS.—In this section—

22           (1) the term “Order” means Executive Order  
23 12291, as in effect on September 29, 1993; and

24           (2) each of the terms “agency”, “regulation”,  
25 and “rule” has the meaning given that term in sec-

tion 1 of the Order, except that the term "agency" includes an independent agency.

**SEC. 7005. ADDITIONAL RESPONSIBILITIES OF DIRECTOR  
OF THE OFFICE OF MANAGEMENT AND  
BUDGET.**

An agency may not adopt a major rule unless the final Regulatory Impact Analysis for the rule is approved in writing by the Director of the Office of Management and Budget or by an individual designated by the Director for that purpose.

**SEC. 7006. STANDARD OF CLARITY.**

To the extent practicable, the head of an agency may not publish in the Federal Register any proposed major rule, summary of a proposed major rule, or Regulatory Impact Analysis unless the Director of the Office of Management and Budget certifies that the proposed major rule, summary, or Analysis—

(1) is written in a reasonably simple and understandable manner and is easily readable;

(2) is written to provide adequate notice of the content of the rule, summary, or Analysis to affected persons and interested persons that have some subject matter expertise;

(3) conforms to commonly accepted principles of grammar;

1           (4) contains only sentences that are as short as  
2       practical and organized in a sensible manner; and

3           (5) to the extent practicable, does not contain  
4       any double negatives, confusing cross references,  
5       convoluted phrasing, unreasonably complex lan-  
6       guage, or term of art or word with multiple mean-  
7       ings that may be misinterpreted and is not defined  
8       in the rule, summary, or analysis, respectively.

9   **SEC. 7007. REPORT BY OIRA.**

10       The Director of the Office of Management and Budg-  
11   et shall submit a report to the Congress no later than 24  
12   months after the date of the enactment of this Act con-  
13   taining an analysis of rule making procedures of Federal  
14   agencies and an analysis of the impact of those rule mak-  
15   ing procedures on the regulated public and regulatory  
16   process.

17   **SEC. 7008. DEFINITIONS.**

18       For purposes of this title—

19           (1) except as provided in section 7004(d)(2),  
20       each of the terms “agency”, “rule”, and “rule mak-  
21       ing” has the meaning given that term in section 551  
22       of title 5, United States Code; and

23           (2) the term “major rule” has the meaning  
24       given that term in section 7004(b).

1 **TITLE** **VIII—PROTECTION**  
2 **AGAINST FEDERAL REGU-**  
3 **LATORY ABUSE**  
4 **Subtitle A—Citizens' Regulatory**  
5 **Bill of Rights**

6 **SEC. 8101. CITIZENS' REGULATORY BILL OF RIGHTS.**

7 (a) IN GENERAL.—Except as provided in subsection  
8 (c), each person that is the target of a Federal investiga-  
9 tive or enforcement action shall, upon the initiation of an  
10 inspection, investigation, or other official proceeding di-  
11 rected against that person, have the right—

12 (1) to remain silent;

13 (2) to be advised as to whether the person has  
14 a right to a warrant;

15 (3) to be warned that statements can be used  
16 against them;

17 (4) to have an attorney or accountant present;

18 (5) to be informed as to the scope and purpose  
19 of the agency action;

20 (6) to be present at the inspection, investiga-  
21 tion, or proceeding;

22 (7) to be reimbursed for unreasonable damages;

23 (8) to be free of unreasonable seizures of prop-  
24 erty or assets; and

1           (9) to receive attorneys fees and other expenses  
2       from the Government when the Government com-  
3       mences a frivolous civil action against such person,  
4       except that nothing in this paragraph shall be con-  
5       strued to affect the Equal Access to Justice Act.

6       (b) AGENCY RULES.—Each agency or other authority  
7       of the Federal Government with respect to which this sec-  
8       tion applies shall make appropriate rules within 90 days  
9       after the date of the enactment of this Act to implement  
10      this section in the context of that agency's functions.

11      (c) LIMITATION ON APPLICATION OF REQUIRE-  
12      MENTS.—A requirement of this section shall not apply if  
13      compliance with the requirement would—

14           (1) substantially delay responding to an immi-  
15      nent danger to person or property; or

16           (2) substantially or unreasonably impede a  
17      criminal investigation.

## 18           **Subtitle B—Private Sector** 19           **Whistleblowers' Protection**

### 20      **SEC. 8201. SHORT TITLE.**

21           This subtitle may be cited as the "Private Sector  
22      Whistleblowers' Protection Act of 1995".

### 23      **SEC. 8202. PURPOSE.**

24           The Federal regulatory system should be imple-  
25      mented consistent with the principle that any person sub-

1 ject to Government regulation should be protected against  
2 reprisal for disclosing information that the person believes  
3 is indicative of—

4 (1) violation or inconsistent application of any  
5 law, rule, regulation, policy, or internal standard;

6 (2) arbitrary action or other abuse of authority;

7 (3) mismanagement;

8 (4) waste or misallocation of resources;

9 (5) inconsistent, discriminatory or disproportion-  
10 ate enforcement proceedings;

11 (6) endangerment of public health or safety;

12 (7) personal favoritism; and

13 (8) coercion for partisan political purposes;

14 by any agency or its employees.

15 **SEC. 8203. COVERAGE.**

16 This subtitle shall apply to:

17 (1) Any agency of the Federal Government as  
18 defined in section 551 of title 5, United States Code.

19 (2) Any agency of a State government that ex-  
20 ercises authority under Federal law, or that exer-  
21 cises authority under State law establishing a pro-  
22 gram approved by a Federal agency as a substitute  
23 for or supplement to a program established by Fed-  
24 eral law.



1 **SEC. 8204. PROHIBITED REGULATORY PRACTICES.**

2 (a) **DEFINED.**—For purposes of this subtitle, “pro-  
3 hibited regulatory practice” means any action described  
4 in subsection (b)(i), (ii), or (iii) of this section.

5 (b) **PROHIBITION.**—(1) No employee of an Agency  
6 who has authority—

7 (A) to take or direct other employees to take,

8 (B) to recommend, or

9 (C) to approve,

10 any regulatory action shall—

11 (i) take or fail to take, or threaten to take or  
12 fail to take,

13 (ii) recommend or direct that others take or fail  
14 to take, or threaten to so recommend or direct, or

15 (iii) approve the taking or failing to take, or  
16 threaten to so approve,

17 such regulatory action because of any disclosure by a per-  
18 son subject to the action, or by any other person, of infor-  
19 mation that the person believed indicative of—

20 (I) violation or inconsistent application of any  
21 law, rule, regulation, policy, or internal standard;

22 (II) arbitrary action or other abuse of author-  
23 ity;

24 (III) mismanagement;

25 (IV) waste or misallocation of resources;



1 (V) inconsistent, discriminatory or disproportion-  
2 ate enforcement;

3 (VI) endangerment of public health or safety;

4 (VII) personal favoritism; or

5 (VIII) coercion for partisan political purposes;  
6 by any agency or its employees.

7 (2) An action shall be deemed to have been taken,  
8 not taken, approved, or recommended because of the dis-  
9 closure of information within the meaning of paragraph  
10 (1) if the disclosure of information was a contributing fac-  
11 tor to the decision to take, not to take, to approve, or to  
12 recommend.

13 **SEC. 8205. PROHIBITED REGULATORY PRACTICE AS A DE-**  
14 **FENSE TO AGENCY ACTION.**

15 (a) **IN GENERAL.**—In any administrative or judicial  
16 action or proceeding, formal or informal, by an agency to  
17 create, apply or enforce any obligation, duty or liability  
18 under any law, rule or regulation against any person, the  
19 person may assert as a defense that the agency or one  
20 or more employees of the agency have engaged in a prohib-  
21 ited regulatory practice with respect to the person or to  
22 a related entity in connection with the action or proceed-  
23 ing.

24 (b) **COMPLIANCE.**—If the existence of a prohibited  
25 regulatory practice is established, the person may be re-

1 quired to comply with the obligation, duty or liability to  
2 the extent compliance is required of and enforced against  
3 other persons similarly situated, but no penalty, fine, dam-  
4 ages, costs or other obligation except compliance shall be  
5 imposed on the person.

6 **SEC. 8206. ENFORCEMENT.**

7 (a) **CIVIL PENALTY.**—Any agency, and any employee  
8 of an agency, engaging in a prohibited regulatory practice  
9 may be assessed a civil penalty of not more than \$25,000  
10 for each such practice. In the case of a continuing prohib-  
11 ited regulatory practice, each day that the practice contin-  
12 ues shall be deemed a separate practice.

13 (b) **PROCEDURES.**—The President shall, by regula-  
14 tion, establish procedures providing for the administrative  
15 enforcement of the requirements of subsection (a) of this  
16 section.

17 **SEC. 8207. CITIZEN SUITS.**

18 (a) **COMMENCEMENT.**—Any person injured or threat-  
19 ened by a prohibited regulatory practice may commence  
20 a civil action on his own behalf against any person or  
21 agency alleged to have engaged in or threatened to engage  
22 in such practice.

23 (b) **JURISDICTION AND VENUE.**—Any action under  
24 subsection (a) of this section shall be brought in the dis-  
25 trict court for any district in which the alleged prohibited

1 regulatory practice occurred or in which the alleged injury  
2 occurred. The district court shall have jurisdiction, with-  
3 out regard to the amount in controversy or the citizenship  
4 of the parties, to—

5 (1) restrain any agency or person who has en-  
6 gaged or is engaging in any prohibited regulatory  
7 practice;

8 (2) order the cancellation or remission of any  
9 penalty, fine, damages, or other monetary assess-  
10 ment that resulted from a prohibited regulatory  
11 practice;

12 (3) order the rescission of any settlement that  
13 resulted from a prohibited regulatory practice;

14 (4) order the issuance of any permit or license  
15 that has been denied or delayed as a result of a pro-  
16 hibited regulatory practice;

17 (5) order the agency and/or the employee en-  
18 gaging in a prohibited regulatory practice to pay to  
19 the injured person such damages as may be nec-  
20 essary to compensate the person for any harm re-  
21 sulting from the practice, including damages for—

22 (A) injury to, deterioration of, or destruc-  
23 tion of real or personal property;

1 (B) loss of profits from idle or  
2 underutilized resources, and from business for-  
3 gone;

4 (C) costs incurred, including costs of com-  
5 pliance where appropriate;

6 (D) loss in value of a business;

7 (E) reasonable legal, consulting and expert  
8 witness fees; or

9 (F) payments to third parties;

10 (6) order the payment of punitive damages, in  
11 an amount not to exceed \$25,000 for each such pro-  
12 hibited regulatory practice, provided that, in the case  
13 of a continuing prohibited regulatory practice, each  
14 day that the practice continues shall be deemed a  
15 separate practice.

16 **SEC. 8208. OFFICE OF THE SPECIAL COUNSEL.**

17 (a) REQUEST FOR INVESTIGATION.—Any person who  
18 has reason to believe that any employee of any agency has  
19 engaged in a prohibited regulatory practice may request  
20 the Special Counsel established by section 1211 of title  
21 5, United States Code, to investigate.

22 (b) POWERS.—The Special Counsel shall have the  
23 same power to investigate prohibited regulatory practices  
24 that it has to investigate prohibited personnel practices  
25 pursuant to section 1212 of title 5, United States Code.

1 **SEC. 8209. RELATION TO CRIMINAL INVESTIGATIONS.**

2       Nothing in this subtitle shall be construed so as sub-  
3       stantially or unreasonably to impede a criminal investiga-  
4       tion.

[The opening statement of Mr. Gekas follows:]

OPENING STATEMENT OF HON. GEORGE W. GEKAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA, AND CHAIRMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Ladies and gentlemen, I am pleased to convene hearings this morning on H.R. 9, introduced by my colleague from Texas Mr. Archer.

H.R. 9 is composed of twelve separate titles, of which only three relating to the jurisdiction of this subcommittee have been referred to the Judiciary Committee. These are titles VI, VII, and VIII.

Title VI relates to strengthening the regulatory flexibility act which was enacted into law in 1981 in order to help relieve the special regulatory burden placed upon small businesses.

Title VII relates to issue of whether and to what extent agencies should develop regulatory impact analyses when they prepare to promulgate new rules.

Title VIII concerns rights and protection for citizens who deal with agencies.

Today's hearing will concentrate on titles VI and VIII and Monday afternoon we will reconvene in this room to hear testimony on title VII. We will begin this morning on title VI (regulatory flexibility) and plan to be concluded on that portion in time to begin consideration of title VIII at 11:30. Therefore, I will move the hearing as expeditiously as possible and ask the witnesses to be as concise in their testimony and answers as possible. I in turn will try to be just as concise in my questions.

Title VI is somewhat familiar to Members of Congress and to veterans on this subcommittee, which as I survey the membership means myself and Congressman Bryant. Last Congress, Mr. Ewing introduced H.R. 830 upon which the subcommittee that Mr. Bryant and I served conducted hearings.

The Regulatory Flexibility Act was passed by Congress in recognition of the fact that not all entities are equal in their ability to absorb and assimilate the burdens placed upon them by government regulation. The act requires that agencies take this into account and determine, as they are developing regulations, which ones would affect small businesses and entities and that agencies consider how to avoid unnecessarily disadvantaging these small entities.

The act envisaged a special oversight role for the chief counsel for Advocacy of the Small Business Administration. The Office of Advocacy with the SBA was created by statute in 1975 and the individual who occupies that position is selected by the President subject to Senate confirmation. His role is described in the law at 15 U.S.C. 634b as one of being the voice of Small Business within the agency rather than being necessarily the voice of the administration.

There has been considerable concern expressed within the small business community for some time that something needs to be done to make the reflex act more effective and to ensure that it is viewed not merely as an obstacle for agencies to sidestep in the rush to regulate. It was adopted by the Congress in recognition that not everything regulated has the same ability to absorb regulation, particularly if it is a Small Business or governmental entity. Deleting the ban against judicial review has been viewed as the best way to ensure compliance.

Not only has the necessity to strengthen the law been expressed by small businessmen, but the national performance review chaired by vice-president Gore made deleting the ban on judicial review its primary recommendation with respect to the Small Business Administration.

We are going to hear today from sponsor's of Reflex Reform, a Representative of the Administration, as well as the Chief Counsel for Advocacy within the Small Business Administration, individuals with personal experience as small businessmen, and representatives from business, manufacturing and public interest groups.

So let us begin what I hope will be a productive and complete hearing on the subject of Reflex Reform.

Mr. GEKAS. We note the presence of our colleagues, Congressman Skelton and Congressman Ewing, who will be testifying. It is more than symbolic that they are here today because they have both been very active in the past with the whole subject matter. Perhaps their work will bear fruit this session. That will conclude my opening statement. I will yield to the ranking member if he wishes to make an opening statement.



Mr. REED. Thank you, Mr. Chairman. It is a pleasure to join with you on the committee and I certainly wish you well as you discharge these important responsibilities. I look forward to working with you and my colleagues on the subcommittee. We are all here to support regulatory flexibility. No one wants to ensnare businesses, particularly small businesses, in endless redtape that doesn't help them nor help solve problems.

A regulation should be designed to solve problems, not create them. And I think the effort that is undertaken here today is a very positive one. Every administration—going back to the Carter, Reagan, Bush, Clinton administrations—has grappled with this problem and I am encouraged today that we, once again, are trying to develop a new way to deal with regulations.

Last year, Mr. Bryant, Chair of this subcommittee, conducted hearings and was very effective in trying to balance the need to improve regulations with the need to ensure that we can, in fact, enforce reasonably and efficiently the laws of this country. That is still the balance that I think we must strike.

I hope as we go forward and listen to the witnesses that they will address some of the issues that I think are critical to this whole debate—the precise and proper role of judicial review, the issue of indirect effects in terms of regulatory burdens on small business, what are these? That is a concept that could be almost philosophical in its breadth. I think we owe it to ourselves, we owe it to our constituents to be careful. Our definitions are precise so that we don't create opportunities for endless litigation, so we do, in fact, streamline the process of regulation.

Again, Mr. Chairman, I look forward to working with you on this very, very important endeavor. Thank you.

Mr. GEKAS. I thank the gentleman. Does any other Member wish time to make an opening statement? I do acknowledge the presence of Congressman Bryant of Texas as one of the Members on the minority side, with whom I had worked in the last session, as has been indicated by the gentleman from Rhode Island. He brings to this table the knowledge about regulatory flexibility or the regulatory problems that face this country. So we start off with a head start as it were.

Mr. BRYANT of Texas. Will the gentleman yield?

Mr. GEKAS. I certainly will.

Mr. BRYANT of Texas. I would like to publicly thank the gentleman for being a very cooperative and easy Member to work with when I served as chairman and I look forward to being as loyal a follower as you were of me.

Mr. GEKAS. I thank the Chair.

All right, let's proceed with the witnesses. Will our colleagues take the table? Congressman Ewing was the chief sponsor of a major piece of legislation dealing with this same subject matter in the last Congress. An original cosponsor of that piece of legislation was his companion at the table—Congressman Skelton.

Congressman Skelton, himself, even before that, was very active in relevant committees and relevant task forces and other enterprises over his career having to do with small business and with the overall problem of regulation and nonregulation. So we will

begin and will allow them to determine the order of their testimony.

Mr. SKELTON. Mr. Chairman, I will yield to my senior friend, Mr. Ewing.

Mr. GEKAS. Congressman Ewing.

**STATEMENT OF HON. THOMAS W. EWING, A REPRESENTATIVE  
IN CONGRESS FROM THE STATE OF ILLINOIS**

Mr. EWING. Thank you, Mr. Chairman, and thank you, Congressman Skelton, for all your good work and help on this matter. I want to begin by thanking the chairman and the ranking member for holding these hearings on the Regulatory Flexibility Act, the RFA, and I look forward to working with you in the coming weeks to strengthen the RFA.

In the 15 years since the RFA was passed, Congress has held numerous oversight hearings and dozens of persons have testified concerning the implementation of the RFA. All of that testimony can be summed up in one sentence—the bureaucrats ignore the RFA because it does not have judicial review and they will continue to ignore it until Congress passes and gives those who are being regulated the right to judicial review.

I will leave it to the small business groups and government groups who will testify before your committee to tell you the story of how ineffective the RFA is. I would like to leave with you two simple messages.

First, the time to pass judicial review of the RFA is now. The only people who refuse to acknowledge the fact that judicial review is necessary are the bureaucrats who want to continue to ride roughshod over small businesses and governments and the special interest groups who benefit from overregulation. The fact that judicial review is included in the Contract With America gives me great hope, and I appreciate the attention this subcommittee has given to this issue.

The second point that I want to leave with the subcommittee is that I strongly urge the subcommittee to pass judicial review without crippling restrictions. During the 103d Congress, we were excited when the Clinton administration indicated its support for judicial review. However, we were extremely disappointed when certain bureaucrats in the Office of Management and Budget and elsewhere convinced the administration to propose a series of restrictions on judicial review which would lift the RFA almost—which would have left the RFA almost as toothless as it is now.

Those restrictions include an extremely short statute of limitations on RFA lawsuits, unnecessary limits on standing for filing RFA suits, and a limit on the ability of judges to stay regulations. And as an aside there, may I say to the committee that when we are talking about small businesses and local units of government, they don't have the knowledge of what is happening here usually until some Federal regulator knocks on their door and by then, if all their opportunities to challenge that regulation have expired, it isn't much of a help in enforcing the Regulatory Flexibility Act.

Put yourself in the place of a small business person and I think you will understand that. I then urge this committee in the strongest terms possible to pass a clean, simple, regulatory, flexibility ju-

ditional review provision which does not contain those types of restrictions which will prevent it from being effective. Those restrictions were written and supported by the very bureaucrats who have failed to comply with the RFA for the past 15 years.

We should pass a straightforward repeal of the prohibitions on judicial review. That is what is contained in title VI and that is what was cosponsored by nearly 260 Members of the House, which was endorsed by dozens of organizations representing hundreds of thousands of small businesses over this country.

A simple repeal of the prohibition on judicial review will allow the Administrative Procedure Act, standards for judicial review to apply to the RFA. Those standards will prevent frivolous lawsuits, but guarantee that small businesses and governments can have their day in court. We are not asking for any special treatment for small business or governments. We are only asking for fair and equal treatment. And let me say we have had the RFA without judicial review for 15 years.

We have had very little appreciation of any good that it has done. We are never done with our job of governing. If we find that judicial review is creating excessive frivolous lawsuits, we will still be here to address that problem later in other Congresses. Thank you, Mr. Chairman.

[The prepared statement of Mr. Ewing follows:]

PREPARED STATEMENT OF HON. THOMAS W. EWING, A REPRESENTATIVE IN CONGRESS  
FROM THE STATE OF ILLINOIS

I would like to begin by thanking Chairman Gekas and Ranking Member Reed for holding this hearing on the Regulatory Flexibility Act (RFA). I look forward to working with you in the upcoming weeks to strengthen the RFA.

In the fifteen years since the RFA was passed, the Congress has held numerous oversight hearings and dozens of persons have testified concerning the implementation of the RFA. All of that testimony can be summed up in one sentence: The bureaucrats ignore the RFA because it does not have judicial review, and they will continue to ignore it until Congress passes judicial review.

I will leave it to the small business and government groups testifying today to tell you the story about how ineffective the RFA is. I would like to leave you with two simple messages.

First, the time to pass judicial review of the RFA is now. The only people who refuse to acknowledge the fact that judicial review is necessary are the bureaucrats who want to continue to ride roughshod over small businesses and governments, and the special interest groups who benefit from over-regulation.

Small businesses and governments have been waiting for fifteen years for Congress to pass judicial review of the RFA so they can finally have a little relief from the tide of regulations flowing out of Washington, DC. The fact that judicial review is included in the Contract With America gives us great hope, and I appreciate the attention this Subcommittee has given to this issue so early in the new Congress.

Second, I strongly urge the subcommittee to pass judicial review without any crippling restrictions. During the 103d Congress we were excited when the Clinton administration indicated its support for judicial review. However, we were extremely disappointed when certain bureaucrats in the Office of Management and Budget and elsewhere convinced the administration to propose a series of restrictions on judicial review which would have left the RFA almost as toothless as it is now. Those restrictions included an extremely short statute of limitations on RFA law suits, unnecessary limits on standing for filing RFA suits, and a limit on the ability of judges to stay regulations for which an agency did not properly comply with the RFA.

I urge this Committee in the strongest terms possible to pass a clean and simple RFA judicial review which does not contain these types of restrictions. Those restrictions were written and supported by the very bureaucrats who have failed to comply with the RFA for 15 years. We should pass a straightforward repeal of the prohibition on judicial review. This is what is contained in Title six, and is what was cosponsored by nearly 260 House members, and which was endorsed by dozens of or-



ganizations representing hundreds of thousands of small businesses all over this country.

A simple repeal of the prohibition on judicial review will allow the Administrative Procedure Act (APA) standards for judicial review to apply to the RFA. Those standards will prevent frivolous lawsuits but guarantee that small businesses and governments can have their day in court. We are not asking for any special treatment for small businesses or governments. We are only asking for fair and equal treatment.

Thank you, Mr. Chairman.

Mr. GEKAS. Thank you. Congressman Skelton.

#### STATEMENT OF HON. IKE SKELTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

Mr. SKELTON. Mr. Chairman, thank you very much for the opportunity to be with you and for holding this hearing. I ask that my formal statement, which I hope the committee has a copy of, will be put in the record.

Mr. GEKAS. If there be no objection, so ordered.

Mr. SKELTON. I go back a long time, Mr. Chairman, with this. Back in 1980, September 19, the Regulatory Flexibility Act was signed into law and I well remember the efforts of our former colleague, Andy Ireland, a fellow member of the Small Business Committee, and how pleased we were that something was going to be done for the small business person.

Things didn't quite work out as we thought. In 1987, as the chairman of the Small Business Subcommittee on Exports, Tourism and Special Problems, I chaired a hearing and later submitted a 5-year report on the implementation of the Regulatory Flexibility Act.

To some agencies' credit, they really made a strong effort to comply. To others' discredit, they did not and some even testified that it didn't apply to them regardless of what the law said.

I want to thank Tom Ewing for his efforts. This is our second joint appearance before this subcommittee, and we want to fix something that we originally intended to come to pass back in 1980, the compliance by the various agencies with the Regulatory Flexibility Act. The giving of judicial review, I think, is a necessary thing and that is why I am so strongly in favor of Tom Ewing's efforts and I compliment him for that.

Rather than going into detail, let me make two recommendations, Mr. Chairman. I strongly urge that your staff go through the archives of the Small Business Committee of the subcommittee that I then chaired in 1987 and review the testimony that was given at that time. If you have trouble finding that, I am sure that my staff or former staff member counsel on the subcommittee could help you locate it. I think you could find it will probably shortcut a lot of your efforts as to some of the agencies were working hard to comply with no complaint and we complimented them for it. Others ignored it; said it didn't apply. Others dragged their feet and gave, as we say back home, a lick and a promise.

I would be—I would strongly urge that you review that testimony and that record, as well as the formal report from our subcommittee of 1987. My next recommendation is that of a concern that I have, title IV of H.R. 9, section 4003, appears to expand the class of beneficiaries of the Regulatory Flexibility Act to include all businesses, both large and small, and I think that if you do that,

I can foresee how corporate giants with deep pockets could stall needed regulation. I think it ignores our original intent of the act to help small businesses.

Mr. Chairman, how many times have I been visiting with small businessmen, and women back home and heard their complaints about the rulemaking and regulations. I think allowing them—the original intent was to help the small businessmen, and women in this country to get out from under all of this, and if you allow the judicial review for these folks, I think that is where the help comes. They don't have the deep pockets. They have trouble hiring a lawyer so many times. So I urge you to take a look at section 4003 in that regard.

This is important work for the economy of our country as well as for the ease of which you can make small business work and work better. And I thank you for the opportunity and, again, thank Mr. Ewing for his strong efforts in this regard.

[The prepared statement of Mr. Skelton follows:]

PREPARED STATEMENT OF HON. IKE SKELTON, A REPRESENTATIVE IN CONGRESS  
FROM THE STATE OF MISSOURI

Thank you for the opportunity to testify today concerning provisions included in H.R. 9 which would amend the Regulatory Flexibility Act, or RFA. It is a pleasure to be here, and I want to thank Chairman Gekas for allowing me to come before the subcommittee to talk about an issue that has been important to me for a number of years.

In my testimony, I would like to discuss the history of my involvement with the RFA when I served as chairman of a House Small Business Subcommittee. Last Congress, I was an original cosponsor of Congressman Thomas Ewing's bill to make improvements to the RFA, H.R. 830. As you know, Title VI of H.R. 9 is identical to Mr. Ewing's bill from the 103d Congress.

On September 19, 1980, the Regulatory Flexibility Act was signed into law. Its passage was the result of three years of hard work by the House Small Business Committee and other Committees in Congress, but more importantly, it culminated a decade of effort by thousands of concerned businessmen and women from every state involved in every kind of business. They rebelled against a volcano of seemingly senseless, ill-conceived regulations that threatened to bury everyone but was particularly harsh for small businesses. The tool they forged, the RFA, was a new chapter to the Administrative Procedure Act requiring bureaucrats to think about the effects of their actions, consider simple alternatives and include the interested public in on the process.

One small business owner testified to the importance of the RFA by saying during our hearings:

Because we smaller (businesses) don't have a large (or indeed any) staff in Washington, it is impossible for us to participate—and make small business impacts known on the record—in every phase of every hearing on every docket before the (agency). I believe it is incumbent upon the agency to comply with the Regulatory Flexibility Act by considering and reporting the expected impact on small businesses in each of its decisions.

In 1987, the Small Business Subcommittee on Exports, Tourism, and Special Problems, which I chaired, submitted a five-year report on the implementation of the RFA. The subcommittee conducted hearings, reviewed the reports of the Small Business Administration Office of Advocacy, and read court decisions that interpreted the RFA in that five-year period. The subcommittee also questioned federal agencies which had successfully implemented the RFA and agencies which were struggling with its implementation.

The findings and recommendations of that report still merit review today. The subcommittee found that most federal agencies, required by law to comply with the RFA, were making an effort to do so. Agencies which had made a conscious policy to find the best way to comply with the Reg Flex Act had established procedures to institutionalize the process of analyzing proposed regulations for their impact on small business.

Agencies in compliance with the RFA were found to have communicated the regulatory alternatives to the appropriate businesses, responded to small business comments in a thoughtful way, and fashioned solid regulations in even the most technically demanding cases concerning the most emotionally charged issues. As an added benefit, those agencies which have established such systems informed the subcommittee that it saves time, money, and litigation headaches because the agencies were able to promulgate well-founded regulations.

However, the subcommittee also found that agencies which did not wish to comply with the letter or the spirit of the RFA had fallen back on the argument that compliance is too expensive and time consuming. These agencies have interpreted key portions of the law in such a way that the objectives of the law have been thwarted and its requirements circumvented.

In answer to their arguments, the subcommittee found that the Reg Flex provides the essential elements that are necessary to make compliance with the RFA less costly and less time-consuming. The noncomplying agencies need only make the effort to find a procedure that will work with their existing regulatory system. The subcommittee points out that other agencies have exercised their discretion to find unique and creative methods of rulemaking which meet the goals of the act while carrying out the duties of those agencies. The Chief Counsel for Advocacy of the Small Business Administration is also available to consult with any agency that needs help.

The subcommittee also had serious concerns about the ability of the Chief Counsel for Advocacy of the Small Business Administration to monitor compliance with the RFA given the limited budget and manpower of the office. The subcommittee recommended that the Advocate be more aggressive in his or her comments when an agency has not seen fit to even certify, or have completely disregarded the act. However, this criticism was made knowing that the Advocate cannot invalidate regulations nor compel judicial review. Also, the Advocate must review thousands of regulations with a relatively small staff.

Finally, the five-year report notes that confusion exists as to the meaning of certain key sections of the act and that the Judiciary has resolved this confusion in favor of the minimum required standard with maximum agency discretion. The subcommittee concluded that legislation was necessary to amend the RFA to strengthen and clarify the Act to fulfill the intent of Congress.

The Regulatory Flexibility Act is an important weapon in our efforts to reduce or eliminate unnecessary regulations and paperwork which cripple small business. If operated properly, it makes sure that the little guy (the small town, the small business, or the small association) is sought out and asked his opinions on government proposals that will influence his life. The RFA ensures that his sensible suggestions will be listened to, checked out, and answered.

The RFA has been a success where it has been faithfully and routinely applied. It is now our responsibility in the Congress to make what changes are necessary, to provide whatever encouragement is required, to see to it that the RFA is fully implemented government-wide.

Before I close, I would like to mention my concern about a provision found in Title IV of H.R. 9. Section 4003 appears to expand the class of beneficiaries of the RFA to include all businesses, both large and small. While I believe that Congress and regulatory agencies should seek to lessen regulatory burdens for businesses of all sizes whenever possible, the Regulatory Flexibility Act was designed specifically to assist small businesses, which often lack the staffing and financial resources to cope with these burdens. I can foresee, and I know that other members of the House Small Business Committee have expressed reservations, that allowing large businesses to take advantage of the RFA with judicial review could seriously jeopardize legitimate rulemakings. Corporate giants with deep pockets could stall needed regulation. And it ignores our original intent of the act—to help small businesses overcome the disproportionate financial impacts they absorb within the rulemaking process. I hope that this committee will find a way to alleviate our concerns about Section 4003 in the days ahead.

Thank you again for holding these hearings today. The proposed improvements to the Regulatory Flexibility Act will strengthen the law and fulfill the promise of more than a decade's work.

Mr. GEKAS. I thank the gentleman. Before we begin the round of questions, I would like to formally introduce the Members who are here so that the audience and the record will indicate their presence and their new-found membership on our subcommittee.



On the majority side, Mr. Flanagan of Illinois, Mr. Chabot of Ohio. To my left, the ranking member, whom you have already met, the gentleman from Rhode Island—Mr. Reed, Mr. Scott of Virginia, and Mr. Bryant, whom we have already acknowledged who in the previous term was the chairman of this very subcommittee.

With that, I am going to pose just a few introductory questions. Congressman Ewing, I take it you are satisfied with the way that title VI of H.R. 9 is emulating your proposal. Is that correct?

Mr. EWING. That is correct, Mr. Chairman. But I would like to associate myself with the remarks of Congressman Skelton on the expansion of that. I am concerned about that, also. I think they have different problems, big business and small business. This is to address small business and units' of governments problem and I think it should be left that way.

Mr. GEKAS. Yes. I want to assert as the Chair that we will take to heart the suggestion of Mr. Skelton to review the work that was previously done, particularly as to the 5-year report which I did not know myself existed.

Mr. SKELTON. Mr. Chairman, I would also strongly suggest that someone on your staff review the testimony. It is rather shocking the arrogance that I recall of some of the witnesses. I think it would be well worth your time to have someone review the testimony that we had at our hearing.

Mr. GEKAS. The other assertion that I want to make is that I personally will ask the Members to consider what, if anything, we should do about title IV. Although that title is not under our jurisdiction, it is my intention as we proceed along to investigate this entire set of issues.

With that, I just want to thank our colleagues and I will now ask if the ranking member wishes to pose any questions. So we yield to him 5 minutes.

Mr. REED. Thank you, Mr. Chairman. I want to commend my colleagues, Mr. Ewing and Mr. Skeleton, for their efforts over many years and like them, I supported, the motion to instruct last year, in support of judicial review. But I want to go back and just raise the issue that unlimited judicial review sometimes has problems as well as benefits. It encourages attempts to stop regulations, to stop action and I think we do have to strike a balance between purposeful action and enforcing the Regulatory Flexibility Act.

It seems that some of the proposals that have been made, and maybe I heard your reaction, Tom, about standing, that someone would have to participate in the notice and comment to have standing. The other issue that comes to mind would be the issue of whether someone who could allege an indirect effect would be able to challenge. That could open up the panoply of perhaps everyone in the country, almost everyone having the ability to challenge this on a procedural, not a substantive basis. So I go back to your testimony and I wonder are there any—any procedural steps or limitations under judicial review that you think would be helpful to strike this balance.

Mr. EWING. Well, I believe there are and I believe they are in the Administrative Procedure Act and in the body of case law that interprets that act, which prevents the very thing from happening, anyone having standing. There are certain requirements for stand-

ing. There are certain statutes of limitation in the case law and in the, I believe, Administrative Procedure Act.

What I don't want to see happen is make it so restrictive that it really isn't there at all, and I go back to the comment that I made about small businesses that I have dealt with that have come to me. They really don't know this regulation exists until they are contacted by a Federal agency, either penalized or notified that they are in violation.

Small business don't—they don't have the time to read the Federal Register. They don't have any staff that even knows where the Federal Register is. That is the, I think, the point that I want to make. This is for the little person out there and not for the big corporation that has high-priced lawyers on the staff all the time looking for those types of regulations.

Mr. REED. Thank you. Thank you.

Mr. SKELTON. May I make a quick comment on that? It appears to me and Mr. Ewing probably has the citations or possibly this committee has the citations, but that this has been before several Federal judges and my recollection is that they have interpreted this in rather narrow confines. So I would judge using that as your standard.

I can understand your concern and I would have it as well if indirect, indirect effects on someone way out in left field. It is plain the court has jurisdiction over this act. That is not our intent. Our intent is a singular, narrow intent to take care of the person that is really being affected by this. And they are out there. The law is there. Let's give it some backing and some teeth. That's all in the world we are asking.

Mr. REED. Thank you.

Mr. GEKAS. The Chair notes the presence of the gentleman from Georgia, Mr. Barr.

Mr. BARR. Good morning, Mr. Chairman.

Mr. GEKAS. Anyone else need to have time yielded? Mr. Flanagan, Mr. Scott.

Mr. SCOTT. Need to have time? I don't need to have time.

Mr. GEKAS. Mr. Bryant. The gentleman is recognized for 5 minutes.

Mr. BRYANT of Texas. Thank you. I would just like to pose a question to both of our witnesses today, our guests here. It is, I think, worthy of at least discussion to ask why it is that if you have a government that issues regulations and has 435 Members of the House and 100 Members of the Senate and, of course, the President and the Vice President, all of them have to go to the voters to get here, why we are not able to deal with this matter in the same manner we deal with other problems.

The local businessman calls you up and says you won't believe what they have asked me to do now, what has happened to me now, and we take the matter up and go to the agency and raise Cain about it until it changes. Now, I know that has happened and that might not be an adequate example. Why doesn't that happen?

Mr. SKELTON. Let me share with you. I passed an amendment that gave relief to nonphysical economic damage as a result of certain laws dealing with our exports to Mexico quite some years ago. I thought I had done the greatest thing in the world for small busi-

ness, small agribusiness, chemicals, corn, distributors and the like. Then the rules and regulations came out.

Two counties in the United States of America qualified. On a bipartisan basis, the gentlelady from Nebraska and I went after them. We had a hearing and as a result of that hearing, the rules and regulations were changed that 14 counties in Missouri's 114 qualified. The rules and regulation power can sometimes be vicious. And by the time this was changed again so that people who were truly affected, it was—they were either out of business or it was too late.

The bureaucracies won. The money was there. It was an amendment to an amendment by Berkley Bedell. I was sorely disturbed that my legislative efforts were put to naught as a result of this. You are speaking of case work when in truth, in fact, this is a judiciary problem whether the judiciary ought to have the right to rule.

Mr. BRYANT of Texas. Let me follow up on that.

Mr. SKELTON. Yes.

Mr. BRYANT of Texas. Whoever was President of the United States at that time, it would seem to me, basically deserves the blame for that. Because they were in charge and I guess it is fair to ask, we had 12 years here with President Reagan and President Bush, Republican administrations, which are the most vocal about the hostility to regulations compared to our party. And we had a Regulatory Flexibility Act during that period of time, as well.

Why isn't it fair to ask how is it now that only in the last 3 years or so that we are hearing so much about the need to do this? I mean, why can't we say whoever was President was to blame, whether it is now or then. Maybe you are talking about the days of Jimmy Carter. I am not sure who was President.

Mr. SKELTON. No, it was after that.

Mr. BRYANT of Texas. They can reach down to their appointees and say this is crazy, fix the regulation.

Mr. SKELTON. Oh, you don't know the trouble I went to and got nothing back.

Mr. BRYANT of Texas. Does that not mean that it came down to basically a disagreement between you and the administration about what ought to be the regulation?

Mr. SKELTON. That is—the regulations were drafted so that nothing would happen and they were successful. Time was on their side. And by the time something was done, the third time, they were gone, the businesses that we intended to help, they were out of business.

Mr. BRYANT of Texas. I yield to Mr. Scott.

Mr. SCOTT. How would judicial review have fixed this?

Mr. SKELTON. Someone would have had standing to have taken that up immediately before a Federal judge for the inappropriate way of drafting rules and regulations. I think that this would have—they wouldn't have had to go because the threat would have been there if they would have written it right the first time.

Mr. EWING. May I respond to that question addressed to both of us?

Mr. GEKAS. Yes.

Mr. EWING. No. 1, I think we all admit that we do casework and we do work for our constituents when they have problems. But I



would submit that that is not the best way the system is intended to work. We are not here simply to help our constituents. That is not why we are elected, solely to help our constituents, or even a major part of our duties is not to help our constituents deal with regulations.

We have the Regulatory Flexibility Act passed during the Carter administration and signed, enforced during the Reagan and Bush administrations with Executive orders, such as President Clinton has issued, all of which are ignored. You know, if you put an order out, unless you sit there and watch every regulation being addressed, they can ignore it and they do. And when the President turns his back to do something else that is important, they ignore it. And all these Presidents have tried to enforce it.

When I brought my legislation forward, it was under the Bush administration and I worked with the Bush administration on having moratoriums on regulations and he did it a couple of times. But that still wasn't the answer. The answer is a lot of different things—you and I doing our part for our constituents when they are being mistreated by the regulator. Also judicial review should be another option open to those who are being regulated, small business.

Mr. BRYANT of Texas. I guess my fundamental question is—and I have not reached a conclusion—whether or not this is ultimately a problem with our political system. I mean, we have all these people elected to see that crazy things don't happen and you and I have had the experience of raising Cain about crazy things and still don't get any relief out of whoever the President is. I wonder if that isn't really the problem. If they appoint these gentlemen to run the agencies, why can't they run down there and fix them?

Mr. GEKAS. The time of the gentleman has expired.

Mr. SKELTON. May I?

Mr. GEKAS. The time of the gentleman has not expired.

Mr. SKELTON. I made a recommendation you get the report of 1987 as well as the testimony and I refer you to the counsel at that time for our subcommittee. He happens to be in the room today, the gentleman in the overcoat standing by the wall who is presently in the Small Business Administration Office of Advocacy. His title is that of Assistant Counsel for Tax.

I know I am helping you do your work very quickly, but he will help you get those two documents very quickly and shorten your search efforts. You will find what I say is true, both about the testimony and about the report.

Mr. GEKAS. If the gentleman will remain by the wall, we will issue a subpoena.

Mr. SKELTON. He is a good Missourian by the name of Russell Orban.

Mr. GEKAS. Does any other Member seek recognition? If not, we really thank our colleagues for their presence here today. We assure them of a close look at the proposed legislation, at the former legislation, and all that preceded with an eye to perfecting the whole system.

Mr. EWING. Thank you, Mr. Chairman, very much, members of the committee.

Mr. GEKAS. Thank you. The next panel will consist of John Spotila, General Counsel of the Small Business Administration, who will be a spokesman in part for the executive branch of our government; and Jere Glover, Chief Counsel for Advocacy of the Small Businesses Administration. He is charged by statute with being the voice for small business within the SBA. Mr. Glover has direct connection with the Regulatory Flexibility Act as part of his jurisdiction. So we welcome the two panelists and ask that they determine between themselves who should begin.

**STATEMENT OF JOHN T. SPOTILA, GENERAL COUNSEL, SMALL BUSINESS ADMINISTRATION**

Mr. SPOTILA. I think I will, Mr. Chairman. Good morning, Mr. Chairman and members of the committee. Thank you very much for inviting me to appear before you on behalf of the administration to discuss strengthening the Regulatory Flexibility Act. I ask that my formal statement be entered into the record.

Mr. GEKAS. Without objection, so ordered.

Mr. SPOTILA. As a small business owner myself and as an attorney representing small business owners for 20 years before joining the SBA as General Counsel, I have a strong appreciation for the cumulative burdens imposed upon small business owners by government regulations. I know firsthand about paperwork and compliance burdens.

Small business owners are creating jobs in this economy. It is vitally important that regulatory agencies consider the impact on the small entities of their proposed rules and then minimize adverse effects as much as possible. For all these reasons, I was very pleased in 1993 when the National Performance Review, under the direction of Vice President Gore, strongly endorsed the idea of adding a right of judicial review to the Reg Flex Act.

At the direction of Erskine Bowles, our Administrator at SBA at the time, I spent considerable time last year working with others in the administration to try to implement that recommendation. I also helped in coordinating an extensive interagency analysis of the cumulative impact of regulations on five specific industries.

With help from 150 small business owners and representatives and 75 agency personnel, we produced this report last July containing 140 recommendations which are now being evaluated and in many cases implemented by EPA, the IRS, OSHA, and the other participating agencies. The point is that we are trying to facilitate this analysis of alternatives of how to minimize the adverse effect of regulations on small business. It is an issue that is very close to our heart and that we are seriously working to try to achieve relief on.

My good friend, Jere Glover, who serves as SBA's Chief Counsel for Advocacy, has been a strong ally and partner in that endeavor. We both very much want to see the prompt passage of a reg flex judicial review provision which benefits small entities in three ways—by encouraging better regulations, by affording access to the courts for relief, and by not bogging people down in a lot of unnecessary litigation.

Last October, President Clinton reiterated his personal support for strong judicial review of reg flex determinations. Today, on his

behalf, I reaffirm the administration's support for this important small business initiative. And let me also take note at this time of the appearances today of Representative Ewing and Representative Skelton. Their leadership has been an enormous help in focusing attention on this issue and we have the deepest respect for them.

During the past 2 years, at the direction of the President and Vice President, Federal regulators have improved their compliance with the Reg Flex Act. Real progress has been made. But any administrative approach is very dependent on the particular individuals involved in the effort and the resources available to them. There is always the risk that some Federal agency in the future might disregard its obligation in this area. The President and Vice President believe, as I do, that the objectives of the Reg Flex Act are too important to be ignored.

The challenge in adding a right to seek judicial review lies in crafting language that will give small entities relief while not requiring them to spend a lot of time and money in litigation. Most small business owners want no part of litigation. What they want instead are better regulations. And in this context, they want a judicial review provision that is clear and complete, encouraging sound regulatory development and giving proper guidance to all concerned so that lawsuits are needed only if and when regulators ignore their reg flex obligations.

With these guiding principles in mind, we suggest respectfully that the committee consider the following points: First, the Reg Flex Act properly focuses on protection for small entities. Requiring agencies to perform regulatory flexibility analyses for other businesses as well would change the emphasis of the underlying statute, would force agencies to divert scarce resources that could be better employed in striving to protect small entities and would extend to large entities the right to initiate litigation even in situations where small entities are pleased with the regulatory approach followed by an agency.

Second, although it may seem appealing to give small entities access to the courts by merely repealing the ban on judicial review now contained in the Reg Flex Act, this may not be the approach that serves small entities best. Small entities would find themselves involved in continuing litigation over the scope, nature and timing of review. This would impose costs upon them which could have been avoided by a more specific judicial review provision. And in the absence of clear statutory direction, there is always the possibility that the courts might be less favorable to small entities than the proponents of judicial review intended.

We suggest to you, again respectfully, that it makes sense to specify a time limit for bringing actions for judicial review, perhaps 6 months or a year, from the issuance of a final rule. It makes sense to clarify the standard of review. The statute should make it clear when and to what extent relief can be given by the courts. We suggest that the courts be given broad power to hold up implementation of a rule or grant other appropriate relief if an agency fails to bring its actions into compliance, but that the courts not be asked to substitute their own judgment for that of the regulating agency as to the substantive nature of a particular rule.



The main point is that the statutory guidance should be made clear so that small entities and the agencies do not find themselves embroiled in unnecessary litigation. Third, the Reg Flex Act properly focuses its attention on the development of final rules by regulating agencies. It makes very little sense to tie up the courts with litigation over proposed rules or such other matters as 10-year plans or regulatory agenda and ideally this point should be clarified in any judicial review provision.

We also believe that it would be a mistake to extend the scope of the Reg Flex Act to an assessment of the indirect effects of proposed regulations. It is very difficult to assess these effects with any degree of accuracy. Even if regulating agencies proceed in good faith, they may be drawn into litigation because of the ambiguity of the statutory language. Instead of giving small entities meaningful protection by requiring agencies to concentrate on mitigating the direct effects of what they propose to do, we end up diverting attention and encouraging wasteful litigation.

These suggestions warrant careful consideration. The President strongly favors prompt passage of a meaningful reg flex judicial review provision. He appreciates how important this proposal is to small business and other small entities. At the same time, we believe the statutory language can be improved and we would be more than willing to work with the Congress on this important legislation. I thank you for giving me the opportunity to speak with you on this subject and we would be happy to try to answer any questions you might have.

Mr. GEKAS. I thank you. We will reserve our right to pose questions till after the second witness.

[The prepared statement of Mr. Spotila follows:]

PREPARED STATEMENT OF JOHN T. SPOTILA, GENERAL COUNSEL, SMALL BUSINESS ADMINISTRATION

Good morning, Mr. Chairman and members of the Committee. Thank you for inviting me to appear before you on behalf of the Administration to discuss current efforts to strengthen the Regulatory Flexibility Act (the Reg Flex Act).

As a small business owner myself, and an attorney representing small business owners for twenty years in New Jersey and Pennsylvania before joining the Small Business Administration as its General Counsel, I have a strong appreciation for the cumulative burdens imposed upon small business owners by government regulations. I have had to deal personally with costly recordkeeping, reporting, and substantive requirements, so I know firsthand about paperwork and compliance burdens. Small business owners are creating jobs in this economy. It is vitally important that regulatory agencies consider the impact on small entities of their proposed rules and then minimize adverse effects as much as possible.

For all these reasons, I was very pleased in 1993 when the National Performance Review, under the direction of Vice President Gore and with substantial involvement from our current Administrator at SBA, Philip Later, strongly endorsed the idea of adding a right of judicial review to the Reg Flex Act. At the specific direction of Erskine Bowles, then our SBA Administrator (and now, of course, Deputy Chief of Staff for the President), I spent a considerable amount of time last year working with others in the Administration to try to implement that recommendation. My good friend, Jere Glover, who serves as SBA's Chief Counsel for Advocacy, and who also will be testifying before you today, has been a strong ally and partner in that endeavor. We both very much want to see the prompt passage of a Reg Flex judicial review provision which benefits small entities in three ways: by encouraging better regulations, by affording access to the courts for relief, and by not bogging people down in a lot of unnecessary litigation.

Last October, President Clinton reiterated his personal support for strong judicial review of Reg Flex determinations. He wants a provision which will give meaningful redress to small business owners and other small entities. Today, on his behalf, I

reaffirm the Administration's support for this important small business initiative (copies of his letter, of similar letters from Leon Panetta and Philip Later, and of the National Performance Review recommendation, are attached to my testimony).

As you know, the Reg Flex Act was designed to ensure federal regulating agencies carefully weigh the effects of their rules on small entities. During the past two years, at the direction of the President and Vice President, and with the assistance of Sally Katzen, as head of the Office of Information and Regulatory Affairs, and of my friend, Jere Glover, as Chief Counsel for Advocacy, federal regulators have improved their compliance with the Reg Flex Act. Real progress has been made. But any administrative approach is very dependent on the particular individuals involved in the effort and the resources available to them. There is always the risk that some federal agency in the future might disregard its obligation in this area. The President and Vice President believe, as I do, that the objectives of the Reg Flex Act are too important to be ignored.

The challenge in implementing this policy objective by adding a right to seek judicial review lies in crafting language that will give small entities meaningful relief while not requiring them to spend a lot of time and money in litigation. Most small business owners want to avoid the courts if at all possible. They want no part of litigation. What they want, instead, are better regulations. In this context, they want a judicial review provision that is clear and complete, encouraging sound regulatory development and giving proper guidance to all concerned so that lawsuits are needed only if and when regulators ignore their Reg Flex obligations.

With these guiding principles in mind, we would like to suggest, respectfully, that the Committee consider the following points in evaluating the Reg Flex provisions of H.R. 9.

1) The Reg Flex Act properly focuses on protection for small entities. Section 4003 of H.R. 9 would require agencies to perform regulatory flexibility analyses for "other businesses" as well. This changes the emphasis of the underlying statute and would force agencies to divert scarce resources that could be better employed in striving to protect small entities. Coupled with its simple removal of any prohibition on the right to seek judicial review, H.R. 9 would extend to large entities the right to initiate litigation, even in situations where small entities are very pleased with the regulatory approach followed by an agency.

2) Although it may seem appealing to give small entities access to the courts by merely repealing the ban on judicial review now contained within the Reg Flex Act, this may not be the approach that serves small entities best. We are concerned that small entities would find themselves involved in continuing litigation over the scope, nature and timing of review. This would impose costs upon them which could have been avoided by a more specific judicial review provision. And, while some lawyers might agree on where the courts are likely to come out on these issues, in the absence of clear statutory direction there is always the possibility that the courts might be less favorable to small entities than the proponents of judicial review intended. We would suggest to you, again respectfully, that it makes sense to specify a time limit for bringing actions for judicial review (perhaps six months or a year from the issuance of a final rule). It makes sense to clarify the standard of review (presumably, the standard now set forth in the Administrative Procedure Act). It makes sense for small entities to realize that courts will be relying on the administrative record and that comments should be filed with the regulatory agency during the rulemaking stage (which, incidentally, also will help the agency issue better rules in the first place). The statute should make it clear when, and to what extent, relief can be given if the courts find that an agency has not complied with the Reg Flex Act. In this regard, we would suggest that the courts be given broad power to hold up implementation of a rule or grant other appropriate relief if an agency fails to bring its actions into compliance, but that the courts not be asked to substitute their own judgment for that of the regulating agency as to the substantive nature of a particular rule. Whatever the final resolution of these questions, however, the main point is that the statutory guidance should be made clear so that small entities, and the agencies, not find themselves embroiled in unnecessary litigation.

3) The Reg Flex Act properly focuses its attention on the development of final rules by regulating agencies. If small entities are to have the right to bring an action in the courts seeking review of an agency's compliance with the Reg Flex Act, it is entirely appropriate that such actions be limited to the review of certifications or Reg Flex analyses prepared for final rules. It makes very little sense to tie up the courts with litigation over proposed rules or such other matters as 10-year plans or regulatory agenda. Ideally, this point should be clarified in any judicial review provision.

4) We also believe that it would be a mistake to extend the scope of the Reg Flex Act to an assessment of the "indirect effects" of proposed regulations. The essential

problem here is that it is very difficult to assess these effects with any degree of accuracy. Even if regulating agencies proceed in good faith, they may be drawn into litigation because of the ambiguity of the statutory language. Instead of giving small entities meaningful protection by requiring agencies to concentrate on mitigating the direct effects of what they propose to do, we end up diverting attention and encouraging wasteful litigation.

These are some suggestions which we feel warrant careful consideration. The President strongly favors prompt passage of a meaningful Reg Flex judicial review provision. He appreciates how important this proposal is to small business and other small entities. At the same time, we believe the statutory language can and should be improved, and we would be happy to work with the Congress on this important legislation.

I thank you for giving me the opportunity to speak with you on this subject and would be happy to try to answer any questions you may have.

THE WHITE HOUSE

WASHINGTON

October 8, 1994

Honorable Malcolm Wallop  
United States Senate  
Washington, D.C. 20510

Dear Senator Wallop:

My Administration strongly supports judicial review of agency determinations under the Regulatory Flexibility Act, and I appreciate your leadership over the past years in fighting for this reform on behalf of small business owners.

Although legislation establishing such review was not enacted during the 103rd Congress, my Administration remains committed to securing this very important reform. Toward that end, my Administration will continue to work with the Congress and the small business community next year for enactment of a strong judicial review that will permit small businesses to challenge agencies and receive meaningful redress when agencies ignore the protections afforded by this statute.

As you know, the National Performance Review endorsed this policy to ensure that the Act's intent is achieved and the regulatory and paperwork burdens on small business, states, and other entities are reduced.

Again, thank you for your continued leadership in this area.

Sincerely,

*Bill Clinton*

## THE WHITE HOUSE

WASHINGTON

October 7, 1994

The Honorable Malcolm Wallop  
United States Senate  
Washington, D.C. 20510

Dear Senator Wallop:

Your particular question about the Administration's position on judicial review of actions taken under the Regulatory Flexibility Act has come to my attention.

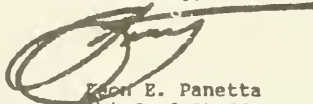
As you have discussed with Senator Bumpers, the Administration supports such judicial review of "Reg Flex."

The Administration supports a strong judicial review provision that will permit small businesses to challenge agencies and receive meaningful redress when they choose to ignore the protections afforded by this important statute.

In fact, the National Performance Review endorsed this policy to ensure that the Act's intent is achieved and the regulatory and paperwork burdens on small business, states, and other entities are reduced.

Ironically, Phil Lader, our nominee for Administrator of the Small Business Administration (whose nomination was voted favorably today by a 22-0 vote of the Senate Small Business Committee) has been a principal champion of judicial review of "Reg Flex." In his capacity as Chairman of the Policy Committee on the National Performance Review, Phil vigorously advocated this position. I know that, if confirmed, as SBA Administrator, he would join us in continued efforts to win Congressional support for such judicial review.

Sincerely,



Ron E. Panetta  
Chief of Staff

cc: Senator Bumpers  
Senator Pressler  
Senator Nunn  
Senator Thurmond  
Senator Hollings



October 8, 1994

Honorable Malcolm Wallop  
United States Senate  
Washington, DC 20510

Dear Senator Wallop:

The Administration supports strong judicial review of agency determinations under the Regulatory Flexibility Act that will permit small businesses to challenge agencies and receive strong remedies when agencies do not comply with the protections afforded by this important statute.

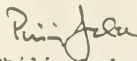
In fact, the National Performance Review publicly endorsed this policy to ensure that the Act's intent is achieved and the regulatory and paperwork burdens on small businesses, states, and other entities are reduced.

As Chairman of the Policy Committee of the National Performance Review, under Vice President Gore's leadership I vigorously advocated this position. I have continued to champion this policy within the Administration.

If confirmed as Administrator of the U.S. Small Business Administration, I will join the Congress and the small business community in continued efforts to pass legislation for such judicial review.

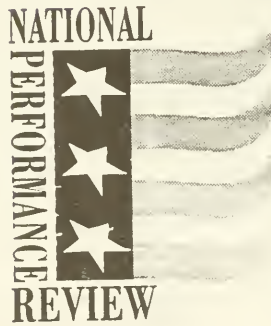
Thank you for your leadership on this important issue to small business.

Sincerely,



Philip Lader  
Administrator-Designate  
U.S. Small Business Administration

# SMALL BUSINESS ADMINISTRATION



Accompanying Report of the  
National Performance Review  
Office of the Vice President  
Washington, DC

September 1993



PRINTED ON RECYCLED PAPER



SBA01:

# ALLOW JUDICIAL REVIEW OF THE REGULATORY FLEXIBILITY ACT



## BACKGROUND

Small businesses often feel overwhelmed by well-intentioned regulations that burden them with needless costs. Congress and the President recognized this problem in 1980 and enacted the Regulatory Flexibility Act (RFA). The RFA requires agencies to seek alternative regulatory solutions when their rules have a disproportionately severe impact on small entities, including small businesses and nonprofit organizations and relatively small government jurisdictions. However, most agencies have failed to perform the required RFA analysis. Rules continue to be issued even though the harm that resulted could have been alleviated had they been examined according to RFA guidelines.<sup>1</sup>

For example, in 1986, Congress enacted the Emergency Planning and Community Right-To-Know Act, requiring local reporting of hazardous chemicals. The initial Environmental Protection Agency (EPA) implementation instructions required reporting "any amount" of hazardous chemicals. The potential impact on small business was staggering. Even hot-dog stands would have been required to report bottles of solvent or metal polish.

The Small Business Administration's (SBA's) Office of Advocacy, which is directed by law to monitor compliance with the

RFA, coordinated small business comments with EPA, which explored less burdensome alternatives. As a result of this process, EPA raised the threshold for reporting to 10,000 pounds of hazardous chemicals. This threshold eliminated hundreds of thousands of unnecessary reports, yet still covered more than 95 percent of the total quantity of stored chemicals and 100 percent of those in quantities likely to produce the sort of hazard that was the concern of the legislation.

The RFA, which works in conjunction with the fundamental agency rulemaking law, the Administrative Procedure Act (APA), leads rulemakers to one of two outcomes:

(1) For rules that will have a significant economic impact upon a substantial number of small entities, the agency is required to perform a regulatory flexibility analysis. This analysis defines the burdens of the rule and examines alternatives that will lessen those burdens for small entities.

(2) For rules that will not have a significant economic impact upon a substantial number of small entities, the agency must so certify, with a brief statement explaining the rationale behind this conclusion.

While SBA's Office of Advocacy can ask agencies to follow the RFA, no mechanism for enforcing compliance exists. As a result,

## RECOMMENDATIONS AND ACTIONS

federal agency compliance is spotty at best. A few agencies, such as the EPA, the Food Safety Inspection Service, and the Nuclear Regulatory Commission, now consistently use the RFA to reduce the regulatory burden imposed on small entities. Most agencies employ simplistic analysis that barely meet even the minimal requirements of the RFA. Others, including the Internal Revenue Service, define their rulemaking activities in the *Federal Register* as "interpretative, a category excluded from RFA responsibilities."

Several administrative efforts have been made to improve the level of responsiveness to the RFA, but with little success. The fundamental solution is judicial review, an approach favored by small business. Such review is permitted for agency rulemaking under the APA. However, the RFA itself prohibits judicial review of agency compliance with the RFA. Courts have further restricted the use of RFA analysis as evidence in suits brought under the APA.

For the RFA to succeed at its goal of avoiding needless government regulatory burdens on small entities, sanctions for non-compliance with the RFA must be created.

With judicial review, small entities could challenge an agency's failure to perform an RFA review or a flawed RFA review. They could sue in the appropriate federal court and, if they won, the court could order the agency to explain its RFA determination or develop appropriate alternatives under the RFA. A credible threat of lawsuits would give agencies a strong motive to ensure that the RFA is followed.

Judicial review is supported by all major small business associations, including the American Small Business Association, the American Trucking Association, the National Association for the Self-Employed, the National Association of Manufacturers, the National Federation of Independent Business, National Small Business United, the National Society of Public Accountants, the Small Business Legislative Council, and the U.S. Chamber of Commerce.<sup>2</sup>

To create better compliance with the RFA and avoid needless lawsuits, the availability

of judicial review must be accompanied by systematic compliance guidelines for agencies concerning how to conduct RFA reviews. For more than a decade, most agencies have failed to develop such guidelines on their own.

## ACTIONS

*1. The Regulatory Flexibility Act of 1980 should be amended to allow for judicial review of agency determinations under the RFA.<sup>3</sup>*

This approach would allow small entities that have been injured by an agency action to seek judicial relief. This would be possible only after an agency has published a final rule, not at any earlier point in the rulemaking process.

*2. An Executive Order should be issued requiring the SBA Office of Advocacy to issue governmentwide guidance on appropriate processes for complying with the analytical requirements of RFA.<sup>4</sup>*

This approach would provide consistent technical guidance—the foundation for avoiding lawsuits.

## IMPLICATIONS

The potential for judicial review would give agencies greater incentive to meet their present statutory obligations to consider the impact of their rules on small entities. Agency lawyers would ensure that the agency would properly comply with the RFA to avoid the valid threat of litigation.

Judicial review is not expected to lead to a large number of lawsuits.<sup>5</sup> No basis for suits would exist if agencies conducted an appropriate RFA review. As a practical matter, most regulations to which small entities have significant objections are already in litigation; judicial review of RFA would at

SBA01: ~~ALLOW~~ JUDICIAL REVIEW OF THE REGULATORY FLEXIBILITY ACT

most add another ground to these challenges. A few new cases based solely on RFA failure might result, in instances in which the impact of rules on small entities is sufficiently negative to impose greater costs than the cost of litigation—a fairly high threshold. In these rare cases, a challenge may be in the nation's best interests.

In the most extreme cases, judicial review of RFA could lead to an initial flurry of lawsuits. Once the first few cases are decided, however, the boundaries between acceptable and unacceptable agency behavior under RFA would become well-known to agency attorneys and the administrative law bar. After that, legal challenges could be expected to fall off dramatically.<sup>6</sup>

Both the process for developing SBA guidance and the guidance itself would help achieve compliance with the RFA. The notice, comment, and public hearings phase would raise the level of awareness in federal agencies about the RFA. Furthermore, the Office of Advocacy expects that the guidance ultimately developed will provide agencies with a map sufficiently detailed to allow them to navigate their way through the RFA with minimal effort.

The RFA does not impose a requirement for an agency to collect additional data except in rare instances in which data originally collected was insufficient to understand the problem the rule was trying to solve.<sup>7</sup> In such cases, the additional task of information collection should not be attributed to the RFA but to an agency's failure to meet its obligations for reasoned decision-making.

## FISCAL IMPACT

Judicial review of the RFA imposes no costs outside the government. In rare cases where there is no court challenge of regulations on grounds other than the RFA and the cost of unnecessary or overly burdensome regulations is greater than the cost of litigation, small entities may choose to incur the cost of bringing suit based solely

on an RFA violation. The cost to these entities cannot be estimated but would be seen by them as a net savings.

Procedures to implement the RFA would be limited to federal agencies. The costs inside the federal government are difficult to estimate because the costs of rulemaking are not a line item and are generally not well-measured. The best estimates available suggest a maximum average of one work day per rule when there is no substantial impact on small entities, a total effort that should be absorbed in the current personnel ceiling.<sup>8</sup> Over the years, SBA has found that only 30 to 50 rules a year have significant negative impact on small entities.

If agencies do not comply with RFA, costs for litigation would certainly accrue. The marginal cost of RFA suits cannot be calculated in advance. Additional funds should not be budgeted for such costs.

## Endnotes

1. See annual reports on the implementation of the Regulatory Flexibility Act, U.S. Small Business Administration, Office of Advocacy, 1981-1992.

2. U.S. Congress, House Committee on Small Business, testimony of James Morrison, July 28, 1993. The organizations listed are the Regulatory Flexibility Act Coalition, which supports judicial review of RFA.

3. Judicial review can be established with the following language: (a) Section 611 of title 5, United States Code is amended by striking subsections (a), (b), and (c) and inserting a new subsection (a): "For purposes of section 702 of title 5, determinations made pursuant to this chapter shall only be reviewable upon publication or service of a rule as required by section 553(d) of title 5."

4. Implementing instructions for complying with the analytical requirements in sections 603, 604, and 605 of the RFA can be brought about by the following executive order: "The Small Business Administration Office of Advocacy shall: Issue guidance to federal agencies for the implementation of the Regulatory Flexibility Act. Such guidance shall be developed after consultation with affected agencies and after such public hearings as may be appropriate. The guidance will be designed to ensure that the analysis conducted under the Act provide data and reasonable alternatives." This approach was used successfully in 1977 to provide a framework for all federal agencies in meeting the requirement to examine environmental impacts or federal actions mandated by the National Environmental Policy Act of 1969 (NEPA). This approach was tested in the Supreme Court, and has been favorably commented on by that court several times. Such guidance would help agencies defend their actions in any legal challenges under the RFA.

Mr. GEKAS. Mr. Glover.

**STATEMENT OF JERE W. GLOVER, CHIEF COUNSEL FOR  
ADVOCACY, SMALL BUSINESS ADMINISTRATION**

Mr. GLOVER. Thank you, Mr. Chairman, members of the committee. It is an honor, a privilege to be here today. I would, indeed, like to thank Congressman Ewing and Congressman Skelton for their hard work on the Regulatory Flexibility Act through the last many years and I would also like to have my entire statement placed in the record.

Mr. GEKAS. Without objection so ordered.

Mr. GLOVER. The Regulatory Flexibility Act charges the Chief Counsel for Advocacy with the responsibility of monitoring the agency compliance with the Regulatory Flexibility Act. Congress, in its wisdom, decided the Chief Counsel for Advocacy should come from the private sector rather than be a bureaucrat. And to this job, I bring a wealth of experience as a small business person, having founded a number of small businesses and I bring a wealth of experience in filling out government forms and trying to comply with the Government regulations as a small business person.

One of the other roles of the Chief Counsel for Advocacy is to represent the views of small business and that is what I am here doing today. I have attended over half of the 40 White House conferences on small business. I have talked to over 10,000 small business people since taking this Office in 6 months and met with virtually every national trade association affecting small businesses.

Small business, in the White House conferences around the country, have recommended specifically that judicial review for the Regulatory Flexibility Act be provided. States such as Illinois, Indiana, Minnesota, Virginia, Massachusetts have all come down very clearly with specific recommendations in this regard. The attitude of small businesses that we have talked to through the last 6 months is pretty well summed up by one of the White House conference participants who basically said it seems that Washington is more concerned with the survival of snail darters and spotted owls than it is with the survival of small business.

Let me just say that overall small business is doing very well. Small businesses have record numbers of new incorporations. We have had record numbers of new businesses with employees. We have had record sole proprietorship profits and clearly especially the 0 to 4 employee size category is growing at phenomenal rates, almost 2.6 million jobs created since 1989. And small business is doing this in spite of a decade of regulatory burdens and neglect.

When the Regulatory Flexibility Act was passed in 1980, it was perceived as a dramatic change in the way government dealt with small business and dramatic improvement, I might say and by and large, it has been. Many of the agencies have complied with the Regulatory Flexibility Act and are very conscious and aware of the burdens that are being placed on small business and they are very sensitive to that. However, even the best agencies on occasion choose to ignore the Regulatory Flexibility Act. And quite frankly, there are some agencies that simply ignore the Regulatory Flexibility Act entirely.



What we say in the Office of Advocacy is some of the agencies miss the boat occasionally and some of them can't even find the ocean. And clearly, that is the situation that we find. I would like to say that there have been significant efforts by my previous Chief Counsels to try to jawbone and encourage compliance with the Regulatory Flexibility Act. There have been annual reports except for a period of time under President Bush, which for some reason which they weren't published, that we published these reports on an annual basis. And each of these reports clearly points out the problems.

The Chief Counsel has testified before the Small Business Committee on a number of occasions and been before this committee, as well, about this problem. This is not a new problem. It is simply the cumulative effect of not enforcing over a long period of time, has allowed significant burdens to increase on small business. There have been, as was discussed, three Presidential Executive orders trying to reduce the regulatory burden on all business and to a large extent specifically on small businesses.

This President, this Vice President are totally committed to reducing the burdens on small business. Despite the efforts of my previous chief counsels and myself, I am here to report to you that all of our efforts have not been successful. Small business still perceives there to be a significant problem in the regulatory burden that Washington has placed on them.

The agencies give us a defense in many cases. Congress has mandated complicated, narrow rules. They point out that often they don't have any choice in reducing the regulatory burden on small business. And quite frankly, in many cases that has been the case and I would urge that Congress apply the principles of the Regulatory Flexibility Act to itself. Because unless the Congress decides whether regulations they are mandating are going to put a significant burden on small business, the agencies don't have the flexibility to adjust those regulations down in many cases.

Let me discuss just some of the Office of Advocacy activities that have occurred since I took office in May. One of the things that I think we have to mention is clearly the fact that the SBA Administrator has Cabinet rank and status on the National Economic Council is a tremendous improvement.

Without Erskine Bowles' fight within the National Economic Council to get the Regulatory Flexibility Act as part of the President's agenda, I don't think we would have had the administration's support. Without Phil Lader, the current Administrator's efforts, I could tell you that on a number—in a number of situations, agencies that had totally ignored the Office of Advocacy's efforts sat down with us, met with us and agreed to come into compliance. So clearly having that Cabinet status has given us some significant leverage that we didn't previously have.

We also have entered into an agreement with OIRA and OMB to help work together to ensure compliance with the Regulatory Flexibility Act. The OIRA is now providing us with drafted proposed regulations before they are even published when they see a problem with the Regulatory Flexibility Act. So we are trying to work out these problems at the lowest levels. I think this memorandum is a good step in the right direction.



The authority to file amicus brief is something that the Office of Advocacy was given. It is something that hasn't been used in the past. Previous chief counsels have not chosen to use that. I did choose to use that and fortunately in both cases after the agencies were notified, once after filing a notice with the court of appeals that we were going to file an amicus, the agencies have come into compliance with the Regulatory Flexibility Act and modified their regulations to lessen the burden on small business. And of course, we have issued our annual report this year in which we point out a number of agencies that have not been, again, in compliance with the Regulatory Flexibility Act.

So clearly, I must basically come to you today and say as a representative who views small business, this is something that every small business association and every small business that has discussed this issue that understands it has clearly said the current system isn't working, we need to have real teeth put into this legislation. We need to have judicial review for small business.

I would encourage you not only to pass quickly an independent bill supporting judicial review of the Regulatory Flexibility Act, but also to consider having Congress make sure that it takes those considerations in and doesn't pass laws that force agencies to pass unreasonable regulations and unnecessary burdens on small business. Thank you, Mr. Chairman.

[The prepared statement of Mr. Glover follows:]

PREPARED STATEMENT OF JERE W. GLOVER, CHIEF COUNSEL FOR ADVOCACY, SMALL BUSINESS ADMINISTRATION

Good afternoon, Chairman Hyde and members of the Committee: It is a pleasure to appear before the Committee on the Judiciary.<sup>1</sup> The issue before the Committee this morning—amending the Regulatory Flexibility Act (RFA) is a subject of paramount interest to me. As you know, the Act charges the Chief Counsel with monitoring agency compliance with the RFA. While I have sought ways to improve agency understanding and compliance with the Act, amendments must be made to ensure agencies comply with the requirements to analyze the impact on small entities.

Support for strengthening the RFA comes from various sources. President Clinton has long supported judicial review of the RFA, and the Vice President's National Performance Review endorsed judicial review early in the administration. Our current Administrator, Philip Lader was the Chief of White House Policy for that process. Erskine Bowles, former Administrator and now Deputy Chief of Staff also supported this initiative. The President reiterated his commitment to judicial review in a letter to Senator Malcolm Wallop in the closing days of the last Congress. The initiative also has support from a bipartisan majority of Congress. The 1995 White House Conference on Small Business process is well underway and a number of the state conferences have raised amending the RFA as a method for achieving meaningful regulatory reform and reducing the burdens on small entities.

After listening to an hour and a half of discussion of the paperwork and regulatory problems facing small business one of the participants in one of the state White House Conferences on Small Business summed up the problem by saying "It seems like saving spotted owls is more important to Washington than saving small business." Hopefully, a strengthened RFA will demonstrate that Washington is as interested in saving small business as they are in saving wildlife.

The question facing both Congress and the executive branch is how do we minimize these regulatory burdens, provide the underpinnings of vibrant economic growth, and still protect the public from imminent threats to health and safety.

As a preliminary matter, I believe it is critical that the executive branch and the legislative branch work together to solve this problem. Regulations are often imposed as a result of legislation. For example, the Clean Air Act Amendments of

<sup>1</sup> My testimony this afternoon reflects the independent views of the Chief Counsel for Advocacy and may or may not be the views of the Administration.

1990<sup>2</sup> and the Cable Consumer Protection and Competition Act of 1992 (Cable Act)<sup>3</sup> both require federal agencies to develop a sheaf of regulations. If Congress passes less burdensome laws to meet its goals and agencies are committed to adopt simplified regulations, small business will feel real regulatory relief. When legislation is pending, agencies should be pushed hard during legislative debate to give the real cost of the legislation and implementing regulations on small business.

To say that the problem rests solely on the shoulders of Congress would be untrue. No doubt exists that federal regulators also need to do a better job of developing sensible regulation and tailoring those rules to both the size of the problem and the size of the enterprise. Regulators must understand that a one-dimensional approach to a multi-dimensional world is inappropriate. Congress recognized early on that regulations do not have the same impact on small and large businesses. The best vehicle for recognizing these distinctions is the RFA and better compliance with the Act by all federal agencies will provide substantive assistance in relieving regulatory burdens on small business.

Rational government decisions must be based on sound data filtered through a close analysis of potential alternative actions. The President, in his Executive Order 12,866 (as did predecessors Presidents Reagan and Bush), understands the need for increased analysis before regulating. The National Performance Review (NPR), President Clinton's effort to streamline government, recommended that compliance with the RFA be strengthened by permitting judicial review of agency determinations under the Act. The President, in a letter to former Senator Wallop, expressed his support for adding a judicial review provision to the RFA.

Having the Administrator of SBA on the National Economic Council with cabinet level status has allowed the voice of small business to be heard. Erskine Bowles' and Phil Lader's strong voices supporting judicial review for the Regulatory Flexibility Act, were essential in winning the President's strong support for this initiative.

## I. THE RATIONAL DECISIONMAKING PROCESS AND THE RFA

As you are aware, the Administrative Procedure Act (APA) prohibits an agency from taking actions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. . . ." 5 U.S.C. 706(2)(A). The courts have interpreted this mandate as requiring an agency to adopt rational rules.

Rational rulemaking presumes that an agency has identified a problem that needs correction.<sup>4</sup> It then accumulates information to determine the severity of the problem and potential corrective actions. After due consideration of various alternatives, the agency publishes a notice in the FEDERAL REGISTER requesting comments from interested parties. The agency considers the comments and issues a final rule responding to the comments and explaining why it took the action that it did.

Congress, in enacting the RFA, mandated that agencies add one further consideration to this process—the impact of proposed solutions on small entities, including, but not limited to, small business.<sup>5</sup> The RFA is based on two premises: 1) that federal agencies often do not recognize the impact that their rules will have on small businesses; and 2) that small entities are disproportionately disadvantaged by federal regulations compared to their larger counterparts. Thus, rational rulemaking pursuant to the APA must be executed through the filter of the RFA. It is the job of the Office of Advocacy to monitor, improve and report to Congress on agency compliance.

## II. UPDATE ON ADVOCACY ACTIVITIES

The Office of Advocacy just released its Annual Report on the Implementation of the Regulatory Flexibility Act. That report provides an excellent summary of problems related to compliance with the RFA. Despite the difficulties outlined in the report, the Office of Advocacy has been aggressive in attempting to obtain improved agency compliance with the RFA.

<sup>2</sup>The Clean Air Act Amendments were passed by a bipartisan vote of both chambers and signed into law by President Bush.

<sup>3</sup>The Cable Act was enacted into law over the veto of President Bush by a wide bipartisan margin.

<sup>4</sup>For purposes of this discussion, I assume that the agency has the statutory authority to correct the problem but has no specific mandate to address the particular problem. In the case of a specific mandate from Congress (or in rare circumstances the courts), the process outlined will be the same except the legislation will have identified the problem to be corrected.

<sup>5</sup>As the Committee is aware, regulations often impose burdens on small governmental jurisdictions.

## A. THE LETTERS OF EXCHANGE

First and foremost, the Office of Advocacy exchanged letters with the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) (copies of which are attached). These letters commit the Office of Advocacy to provide guidance to agencies in complying with the RFA and raise concerns to the agency and OIRA. They also commit OIRA to provide us with draft proposed rules upon our request before they are published in the Federal Register and referee any disputes between the Office of Advocacy and the agencies. Sally Katzen, Director of OIRA, should be commended for her eagerness in cooperating to enforce the RFA.

The letters of exchange arose from OIRA and Advocacy's response to a recommendation from the General Accounting Office to have the two offices work more closely. More importantly, these letters recognize that the Office of Advocacy can be a valuable ally in OMB's efforts to further rationalize agency rulemaking procedures.

Nevertheless, the letters of exchange are not a comprehensive solution to the problem. OIRA's regulatory oversight does not extend to independent regulatory agencies, such as the Federal Communications Commission or the Federal Trade Commission.<sup>6</sup> Nor does OIRA have authority to oversee the regulatory actions of the Agricultural Marketing Service with respect to the implementation of marketing orders.<sup>7</sup> Finally, OIRA's actions under the letters of exchange are voluntary and subsequent heads of OIRA and Advocacy need not abide by the letters of exchange.

More importantly, while Advocacy and OIRA hold sway over regulators, the APA places the final responsibility for deciding regulatory issues in the hands of federal judges. Judicial review of the RFA merely extends this principle to rules requiring small business analysis.

## B. USE OF ADVOCACY'S AMICUS AUTHORITY

Section 612 of the RFA authorizes the Chief Counsel to file amicus briefs in court when another party challenges an agency regulation. It appears that, in appropriate circumstances, even the threat of filing an amicus brief radically alters an agency's consideration of small business problems.

The Office of Advocacy has been involved intimately in the Federal Communications Commission's (FCC) implementation of the Cable Act. At an early stage, the Office of Advocacy recognized the severe impact that the rules would have on small cable operators, most of whom were not the genesis of problems that led to reregulation of the industry. Extensive comments filed by the Office of Advocacy concerning the burdens on small operators were dismissed by the FCC.

In 1994, the Commission finalized its rules on rate regulation. An association of small cable operators intervened in the litigation contesting the validity of the regulations, and in particular, compliance with the RFA and the Small Business Act. I saw this as an opportunity to test the roiling waters of §612 and filed a notice of intent to file an amicus with the United States Court of Appeals for the District of Columbia Circuit. After the Commission learned of our intention to file an amicus brief, the Commission led by its General Counsel and head of the Cable Services Bureau began earnest negotiations with the Office of Advocacy to arrive at a solution to the concerns we raised. After much negotiation, the Office of Advocacy and the Commission developed a satisfactory resolution to our concerns and we agreed not to file the brief.

Our interaction with the National Marine Fisheries Service (NMFS) demonstrates that threats to file an amicus brief, even of a non-imminent variety, can force an agency to improve its compliance with the RFA.

As you may be aware, the North Atlantic fishery, particularly in the Georges Bank, is heavily overfished. NMFS regulates fishing in accordance with the Magnuson Fishery Conservation and Management Act. NMFS recognized that overutilization of the North Atlantic fishery was endangering the long-term viability of the fishery and proposed stringent measures to reduce overfishing.

The Office of Advocacy, after discussion with a variety of affected entities, wrote NMFS requesting that it examine alternatives which may be less burdensome. A fol-

<sup>6</sup>The Paperwork Reduction Act empowers OIRA to review requests for information collections from all agencies including independent regulatory agencies. However, the independent regulatory agencies can override an OIRA disapproval of an information collection—something executive branch agencies cannot.

<sup>7</sup>Appropriations riders enacted for the past ten years have prevented OIRA from expending any monies on oversight of implementation of marketing orders. The Office of Advocacy believes that this rider should be eliminated and OIRA have the authority to exercise its proper oversight of the program.



low-up letter was drafted in which the Office of Advocacy criticized the Service for failure to respond to our previous filings and threatened to intervene in litigation<sup>8</sup> contesting the implementation of the Service's plan to deal with overfishing.

The response, as one might expect, was predictable. The number two lawyer at NMFS requested a meeting with the Office of Advocacy. Staff in the General Counsel's office of the Department of Commerce also contacted us. The Office of Advocacy had detailed discussions which led to modifications in the manner in which NMFS complies with the RFA. In addition, the Office of Advocacy now has an open channel with Commerce Department and NMFS staff to discuss RFA compliance.

The threat of intervention in litigation, while having both shock value and excellent results, is not a general anodyne to agency compliance with the RFA. The Office of Advocacy does not have the resources to intervene in every circumstance in which an agency did not comply with the RFA. Nor would that be an effective strategy with overuse. At some point, agencies would simply tell the Office of Advocacy to go ahead and file and that the agencies do not care.

### III. RECALCITRANT AGENCIES

A number of federal agencies have historically been less than cooperative in our efforts to obtain compliance with the RFA. This is not an exhaustive discussion. In fact, many agencies, with respect to particular rules, do not, in our estimation, fully comply with the RFA. Yet, the same agencies in other rulemaking activities do fully comply. Thus, it would be impossible to state unequivocally that an agency such as the Department of Interior or the Environmental Protection Agency<sup>9</sup> does or does not comply with the RFA.

Such scorekeeping dramatically misses the point in any event. The purpose of the RFA is to force agencies to recognize the impact of their rules on small entities in every rulemaking. An agency can be obsessive about compliance with the RFA for almost all of its rules. However, if it fails to comply with the RFA in promulgating a regulation that has dramatic impact on small business, then its failure more than outweighs its successful implementation in most of the other cases.

The recalcitrant agencies discussed in this section do not miss the boat on compliance with some regulations. They cannot even find the ocean. These agencies place in stark relief the obstinacy that can be developed to avoid compliance with the RFA.

#### A. THE INTERNAL REVENUE SERVICE

The history of the Internal Revenue Service's (Service) compliance with the RFA has been the subject of extensive testimony before this committee and has been a "low light" of the Chief Counsel's annual report. I will not repastinate those commentaries. Rather, I would like to show why the Service's failure to comply represents such a problem.

The Service proposed regulations that would address perceived abuses by partnerships (Subchapter K entities) in reducing their aggregate tax liability. The proposed rule would apply to all partnerships of which 88% had gross receipts of less than \$250,000. The Commissioner proposed to retain the authority to recast any transaction, even one that was valid when completed and complied with the literal language of the Internal Revenue Code, as abusive. Thus, no small partnership would ever have any certainty with respect to future transactions or, more importantly, past transactions.

It is beyond cavil by all parties, other than the Service, that the rule would have a significant economic impact on a substantial number of small entities. Despite this patent effect on small business, the Service did not perform a regulatory flexibility

<sup>8</sup>The litigation was withdrawn because it became moot due to subsequent and further rapid deterioration of the North Atlantic fishery.

<sup>9</sup>For example, the Office of Advocacy has effectively worked with the Environmental Protection Agency (EPA) to obtain meaningful relief in some but not all instances. The Office of Advocacy effectively used arguments based on the RFA to reduce regulatory burdens faced by small quantity generators of hazardous waste and owners of underground storage tanks. The Office of Advocacy also used the principles elucidated in the RFA to get EPA to reconsider its regulations implementing the Emergency Planning and Community Right-to-Know Act. However, there are circumstances in which the Office of Advocacy questions EPA's analysis, such as with respect to effluent guidelines for placer mines, and EPA rejects our suggestions.

An excellent compilation of EPA's record on compliance with the RFA can be found in Micro-economic Applications, Inc., Henry Beale, Robert Burt, and Kathleen Shaver, *Cost-Effective Regulation by EPA and Small Business Impacts* (1992) (SBA Contract No. SBA-4116-OA-89). The report demonstrates that even within one agency different levels of compliance with the RFA are achieved.

analysis; rather, the Service resorted to its typical course of considering the regulations as merely interpretative and therefore not within the ambit of the RFA.

#### B. PROCUREMENT ACTIVITIES

As a general proposition, the APA excludes matters relating to government contracts from the requirements of notice and comment rulemaking. This gap had been used by agencies until 1984 when Congress required that all significant federal contracting regulations be subjected to notice and comment rulemaking. As a result, the major procurement agencies, such as the Department of Defense and the General Services Administration, had to comply with the RFA. Unfortunately their compliance has not been satisfactory. A brief review of current activities will demonstrate the problems facing small business as a result of the failure to fully grasp compliance with the RFA.

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration published a proposed rule to implement various small business provisions of the Federal Acquisition Streamlining Act. The proposed rules would have a—significant economic effect on all small businesses wishing to do business with the federal government. Nevertheless, these agencies failed to perform an initial regulatory flexibility analysis because the rules would be beneficial to small business. Nothing in the RFA permits an agency to avoid its obligations under the Act because the proposals may be beneficial to small business.<sup>10</sup>

In fact, Administrator Later raised the issue of RFA compliance and the need to cooperate with the Office of Advocacy. As a result of the Administrator's actions, we have been assured of future compliance with the RFA in procurement matters.

#### C. THE AGRICULTURAL MARKETING SERVICE

Problems with the Agricultural Marketing Service's (AMS) compliance with the RFA has been an issue before Congress on more than one occasion. I wish I could say that Congressional pressure seriously modified the behavior of the AMS. It did not. A fuller explanation of the problems the Office of Advocacy has with AMS can be found in this year's annual report and the Acting Chief Counsel's testimony before this Committee's Administrative Law Subcommittee in 1993. I will not reiterate those remarks. However, I will share one anecdote which demonstrates the serious problems my office faces in trying to obtain compliance with the RFA.<sup>11</sup>

My office has written to AMS on occasions too numerous to count contesting their implementation of the RFA. My staff has had discussions with various staff members of AMS and submitted a detail memorandum to the Administrator's special assistant concerning AMS compliance. Finally, after repeated missives, the Administrator agreed to meet with me and members of my staff stating "AMS certainly has no desire or intention to . . . fail to comply with . . . the RFA." Letter of November 8, 1994 from Administrator Hatamiya to Chief Counsel Jere W. Glover. A meeting was scheduled for December 20, 1994. On the day of the meeting, the Administrator cancelled without explanation. Further attempts to reschedule have been unsuccessful. However, the most recent issuances from the AMS continue to demonstrate a continuing disregard for the RFA.

The only way to ensure that each rulemaking from every agency complies with both the letter and spirit of the RFA is to make sure that an agency pays a "penalty" for failing to comply with the RFA. The best mechanism for doing that is through judicial review.

#### IV. JUDICIAL REVIEW OF RFA DECISIONS

As you are well aware, an agency's failure to comply with the RFA is not directly contestable in court. Thus, the RFA differs markedly from all other statutes that dictate the process for arriving at agency decisions. This allows federal agencies, as the annual reports have shown, to ignore compliance with the RFA with impunity. The best mechanism is the threat of litigation over agency compliance with the RFA.

As I have demonstrated, the mere potential entrance by the Office of Advocacy in litigation through its amicus authority led the FCC and the NMFS to modify their regulations and procedures for complying with the RFA. A more substantial

<sup>10</sup> A more detailed discussion of this issue can be found in the 1993 Annual Report and to repeat it here in detail is unnecessary.

<sup>11</sup> AMS regulates, by use of marketing orders, the shipment of billions of dollars of milk, fruits, vegetables, and specialty crops. Thus, its failure to comply with the RFA affects a not insubstantial portion of the agricultural markets in the United States.



and ongoing threat, potential judicial review of agency compliance with the RFA, would certainly lead to scrupulous compliance with the RFA, just as similar attentiveness is paid to the impact statement requirements of the National Environmental Policy Act (NEPA).

Historically, the gravest opponents of judicial review have been federal agencies. Rather than viewing the RFA as a beneficial tool, they find it akin to the albatross that figuratively hung around the neck of the Ancient Mariner. The agencies are concerned that this might lead to a barrage of lawsuits and are concerned that full compliance will slow the process of regulatory development.

Congress enacted the APA to force agencies to draft regulations only after acquiring hard facts or data concerning the problem to be addressed. Failure to acquire these facts or data, which can come to light as a result of performing a regulatory flexibility analysis, should be a telltale sign to the agency that it should stop and reexamine the problem before heading forward with a particular solution. Compliance with the RFA slows down the rulemaking process only where the agency has not done a proper analysis as mandated by the APA and collected the appropriate data needed to analyze various options to the proposed rule.<sup>12</sup> If compliance with the RFA demonstrates that an agency does not have the support needed to implement a particular regulatory initiative—so be it.

The fears of judicial review are overstated. Unlike NEPA, interlocutory review of agency compliance would not occur because final agency action has not occurred and parties have failed to exhaust their remedies, i.e., bring to the attention of the agency the failure to comply with the RFA. Second, the cost of litigation would be so large that small businesses would use the provision only to contest the most egregious agency actions. Third, given the current method for challenging final rules, most complaints about RFA compliance would be brought as a separate claim in a challenge to agency rulemaking pursuant to the APA. Thus, the number of potential lawsuits challenging agency regulations would be no greater than they are today. What would change is the likelihood of success in court because it is far easier to demonstrate that an agency failed to comply with proper procedures than demonstrate that the solution ultimately chosen by the agency is arbitrary and capricious. Of course agencies could avoid that pitfall through full compliance with the RFA. Thus, judicial review provides agencies with a significant incentive to comply fully with the RFA—something they do not have today.

#### V. COMMENTS ON REGULATORY FLEXIBILITY PROVISIONS OF H.R. 9

One of the questions asked in the invitation letter was my opinion of the Regulatory Flexibility Act Amendments contained in H.R. 9. I believe that the posture I have taken since arriving at the Office of Advocacy has been consistent. I am more committed to judicial review than the exact language of a bill. In that regard, I believe that the provisions in H.R. 9 which are the same as those introduced by Congressman Ewing in 1993 would accomplish the primary objective of obtaining judicial scrutiny. Similarly, I believe that various versions of amendments to the RFA floated by the Administration and others also would achieve that goal.

If the language of H.R. 9 can be improved—fine—but let's get an independent bill passed as soon as possible so that the Office of Advocacy can turn its attention to ensuring that agencies comply with the RFA. However, I am concerned with any provision that may allow large businesses to come within the zone of interest protected by the RFA. We often find that large firms like government regulations because they raise the barriers to entry and prevent small firms from competing with them.<sup>13</sup>

<sup>12</sup> The FCC's implementation of the Cable Act demonstrates the folly of trying to develop a regulatory scheme within a short time frame. However, in that circumstance, the FCC was trying to comply with statutory deadlines issued by Congress. Still it took nearly a year and numerous reconsiderations to finalize rate regulations, at least for large cable operators. Small operator rules are still in flux because the FCC has not accumulated the needed data to finalize them. Most small operators function using regulations aimed at large operators.

<sup>13</sup> Section 4003 of H.R. 9 extends the requirement to perform a regulatory flexibility analysis, at both the proposed and final rule stages, for "other businesses." In simple terms, it extends the principles of the RFA to all businesses. I believe that this extension is counterproductive to the purposes of the RFA.

The RFA was enacted with the recognition that small businesses face special problems with respect to complying with the federal regulations. Requiring all regulatory flexibility analyses to examine the costs of compliance for all businesses defeats the purposes of the RFA. Section 4003 eliminates the distinction between large and small business—a distinction which I believe still validly exists.

Continued

## VI. CONCLUSION

In 1946, Congress took a giant step forward by standardizing the decisionmaking process used by federal agencies. That Congress and subsequent court decisions demanded that agencies exercise their rulemaking authority in a rational manner. In 1980, Congress recognized that the concerns of small entities, the largest segment of the regulated community in terms of sheer number, were being ignored in the rulemaking process. Congress determined that without appropriate consideration of their concerns rational rulemaking could not occur. However, for whatever reason, that Congress decided not to provide the necessary teeth to force federal agencies to take small entity concerns into consideration when promulgating regulations.

I believe that the time is appropriate to take the necessary steps to force such compliance. Jawboning by my office and OIRA and the issuance of executive orders by three Presidents, while sometimes successful, has not guaranteed compliance and certainly do not effectively address the problems posed by independent agencies' regulations. Only the threat of judicial scrutiny will ensure that agencies will comply with the letter and spirit of the RFA. Even judicial scrutiny will not resolve all regulatory burdens faced by small business until Congress applies the principles of the RFA when it enacts legislation.

I am pleased to answer any questions the Committee may have.

Mr. GEKAS. All right. I thank the witnesses.

It occurred to me that up until today, I had felt very comfortable with the idea that the administration, both the President and the Vice President, had first, endorsed the idea of, a new look at regulatory flexibility, and secondly, an endorsement of judicial review.

But as Congressman Ewing indicated the judicial review offered by Clinton/Gore proposals were clouded, I am not sure he used those words, but they were not wholly satisfactory and they were restrictive, I think he said. I became puzzled as to whether we were in sync with the administration, because of what I had perceived. Now, I want to be disabused of my first inclination or confirmed. Can either of you comment on that?

Mr. SPOTILA. I would like to comment on that, Mr. Chairman.

I have enormous respect for Representative Ewing. I had some discussions with him last year. In his comments today, he indicated that he was concerned that in the discussions last year, representatives of the administration were suggesting limits which would be too restrictive on the time to file, on standing, and on the ability of the courts to grant stays.

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In addition, the inclusion of other businesses in §4003 may allow any business to sue under the RFA not just small businesses. Title VI of H.R. 9 simply eliminates the prohibition on judicial review. Since large entities would be covered by the analytical requirements of the RFA pursuant to §4003, any entity would be aggrieved by an agency's failure to comply with the RFA not just small entities. Any entity would come within the zone of interests protected by the RFA and would thus be eligible to sue an agency for failure to comply with the RFA, compare *Clarke v. Securities Indus. Ass'n*, 487 U.S. 388, 399-400 (1987) (outlining the zone of interest test for standing to challenge an agency action).

Little doubt exists that expanding the universe of entities eligible to sue under the RFA would increase the likelihood that federal agencies would comply with the tenets of the Act. However, the ability of large entities to sue could result in shifting costs to small businesses or otherwise impairing their competitive advantage.

Prior to the enactment of the Clean Air Act, which legislatively resolved the dispute, EPA was considering two methods for controlling volatile organic compounds (VOCs) from automobiles. One would require additional components on automobiles and the other would have required modification of pumps by gasoline retailers. If EPA had chosen to require automobile manufacturers to control VOCs and the H.R. 9 version of the RFA had been in effect, the automobile manufacturers could have contested agency compliance with the RFA. The end result may have been the imposition of that requirement on small businesses—gasoline service stations. The authors of the RFA did not intend such an anomalous result. I do not believe that the RFA should be used as a tool by large businesses to increase their competitive advantage over small businesses or shift their costs to small businesses through litigation.

Finally, if Section 4003 is to be enacted it should be modified to require quantification of compliance costs for certifications as well. Otherwise, agencies will simply certify all their rules and wait until court challenges to provide adequate disclosure of costs.

I don't think there is as much of a difference of opinion, as he may have suggested today. Certainly, not given our current thinking.

Our sense is that there ought to be guidance as to the appropriate time to file, for the reasons that I indicated. There could be differences of opinion as to what that time limit would be. I think the time limit of 6 months to a year is a reasonable approach, and not so overly restrictive that a small business owner would be unable to react.

There is always a balancing between giving small business owners enough time to raise an objection and giving some clarity to all small business owners as to whether or not they need to comply. It is reasonable, and administrative procedures traditionally recognize that it is reasonable, to give guidance on the period of time available.

The risk is—and it may just be that we disagree with Representative Ewing as to how to implement these concepts the risk is that if you merely rely on the courts and existing administrative law, you may actually give less guidance to small business owners or small entities, than would be preferable.

When we look at questions of standing, we certainly feel that any small entity that is adversely affected ought to be able to bring an action. I don't think there is any real disagreement with that. We think that it should be limited to small entities not large entities. I think even Representative Ewing indicated that he agreed with that today.

There was some discussion last year as to whether an individual who brought an action challenging the Reg Flex analysis or certification, should have personally filed comments. There was some discussion back and forth last year as to whether or not that was an appropriate restriction. Clearly, Representative Ewing thinks it is not appropriate. Frankly, we don't suggest that kind of a restriction be imposed.

But small entities need to realize that courts will determine these actions based on the administrative record and they also need to realize that the point of this is better rulemaking, and if people don't comment during the rulemaking stage to give the agencies some guidance as to how to improve their approach, to lessen the adverse impact on small business, then we are not going to get better regulation. We may get more litigation, but we won't help small businesses as much as we need to.

Finally, when we look at the question of court stays of agency action, our sense is again that the best approach is one that encourages agencies to do their job correctly. If they have made a mistake, for whatever reason, in complying with the Reg Flex Act, and a court determines that the quickest way to fix the mistake is to give the agency time to fix it, I think that is an appropriate response.

If the court feels that is not the appropriate relief, then the court should have discretion. If we give guidance in the statute that you have under consideration, I think we will ultimately end up with less litigation interpreting judicial review and can get better guidance to the agencies on the new conditions or standards that they are going to have to live with.



Mr. GEKAS. It seems to me the bulk of anecdotal evidence that we have had over the years, comes because the individual small businessman never learns of the promulgation of the regulation, nor the existence of the commentary period, nor existence of the close of the commentary period and the effective date of the regulation, as has been indicated. He does not know anything about it until someone knocks at his door. So we have to take that into consideration. The publication or the broadcasting of a proposed regulation is not sufficient enough nor is the commentary period sufficient as we have learned as individual Members of Congress.

Mr. SPOTILA. Mr. Chairman, I agree that the real key here, if we are going to have better rulemaking, is that it is extremely important to have better outreach to small business owners, and earlier involvement by small business owners. Those are important steps that the President and Vice President have asked us to work on at this time.

The point I am making is that we need to remember that Reg Flex is only one of the things that needs to be done, that we don't want to end up with a situation where we have created a lot of litigation but still haven't solved the problem. We need to be able to give guidance to people as to what rules really are going to be in effect and what it is they must do in order to comply.

It is going to be necessary to have some time limit as to when people raise a challenge and, to some degree, small entities or their representatives are going to have to follow the rules that affect them, and raise timely objections.

Mr. GEKAS. Does Mr. Glover wish to add or detract?

Mr. GLOVER. My position basically is a strong judicial review, legislation quickly passed, is more important than the specific words. I think that certainly the committee and their staffs can work to improve the language as they wish to, but I come down clearly on the side of let's do something very quickly, and I think that is the position that I take on that, rather than arguing about technical aspects of it.

Mr. GEKAS. Congressman Reed.

Mr. REED. Thank you, Mr. Chairman. And I want to thank the gentlemen for their very excellent testimony.

I think this whole issue of judicial review is a very important one, obviously, and we are struggling to try to come up with a formulation and we have to figure out what the words will be, so we have to pay some attention to this. Right now, we are at one extreme, we have no judicial review.

I think the vast majority of my colleagues, including myself, think that is wrong. But we have to avoid, I think, the worst case, and I was trying to think of a down-to-earth example, and this is one that could happen:

I went up to the gas pump a couple of weeks ago and I noticed the price went up, and found out that EPA has promulgated rules about gasoline up in my part of the country. And I would guess, I mean, in an extreme case, if you were a small business owner, had a truck company, you could go in and argue that the indirect effects of that rule have increased the burden on your business and that you could sue, I guess, if there was no time limit and no other requirements, claiming that the regulatory analysis did not take

into effect the indirect effect of your business; is that a possibility, Mr. Glover?

Mr. SPOTILA. One of the concerns that we have is that we clearly could be faced with lawsuits like that, and it might be a rule that was 7 years old, because someone just found out about it. It is very likely, I think, that the courts would not grant relief in those instances.

The problem is that the small entity would never know how much time they have. And the agencies would never really be able to assess what an indirect effect means, and we end up diverting attention instead of doing what the Reg Flex Act was originally designed to do and getting that job done right.

Mr. REED. It seems to me that the Reg Flex Act was a procedural device to force a set of procedures that would be done scrupulously by the agencies.

Mr. SPOTILA. That is exactly right.

Mr. REED. And yet, when most people get that proverbial knock on the door that Mr. Ewing was talking about, their complaint is not about the procedures, it is about the substance of regulation. They don't like it, it imposes costs they don't think are appropriate, et cetera.

I think that is one of the problems we have here in trying to design to judicial review. There are subsequent complaints against regulation, this is a procedural device, this Regulatory Flexibility Act, yet, I think unless we have some careful wording of the review, we will mix unsubstantive complaints and the procedural complaints, and I don't know if that will help.

Mr. SPOTILA. I think the original premise of the Regulatory Flexibility Act was that by improved procedures, and by getting agencies to look at these questions, we would have better rule-making, and ultimately, better substantive rules, because the agencies would see that there were alternatives to their proposed courses of action, and we would have an opportunity to encourage them to follow that. And I think that premise is still valid today, and that is where the focus of judicial review should be.

Mr. REED. Let me raise one other question about the issue of review, specifically. When you say judicial review, I think that only responds to a portion of the real dilemma.

The next question that issue begs, is what is the scope of review, what will you look at and what is the standard of review, and I wonder if either of you gentlemen have thoughts about that?

If we were to develop a judicial review for this Regulatory Flexibility Act, what would be the scope of what the judge typically looks at and what would be the standard?

Mr. GLOVER. Let me address first the standing issue, because I think you raised an interesting example of the service station. At footnote 13, we discuss at some length the problem with allowing large firms standing to file an action.

Quite often, large firms use regulations to their advantage. They actually like regulations. They raise barriers to entry to competitors, and especially to small business competitors, so you will often find large firms coming in saying, hey, let's write this regulation this way, and a lot of our regulatory burdens have been placed with the active support of large firms.



So clearly, if you have a situation between service station dealers and automobile manufacturers, as to EPA has a choice of how they are distinguishing to reduce the air pollutants, as to whether they are going to change the gasoline or whether they are going to change the car manufacturers' requirements, it would be ironic if large firms had the right to come in and file a suit to overturn a regulation that EPA had enacted that pushed the burden to the large firms, as opposed to the small firms, and that would be totally ironic if the Regulatory Flexibility Act allowed that to happen. And it clearly could. And we discuss a specific example where that was something that could have been considered.

Clearly, on the issue of standing, I think you have to be very sensitive to that issue. I believe the courts will make sure that happens. But I certainly don't object to having clear language that it is only small business. And clearly, the provision in 4003 of the H.R. 9, is antismall business, or certainly could be perceived that way, and result in, really, unintended results. And the last thing that we need to have is help big business with the regulatory problems against small businesses, and it clearly could end up that way.

Mr. REED. Thank you.

Mr. SPOTILA. If I could also add, I think that the most important thing is that, in addition, that judicial review be available to assure that agencies in their certifications, as to whether or not there is a substantial impact on small entities through their rulemaking or in the regulatory flexibility analyses they actually do in connection with the final rule, that those items are reviewed. That is really the heart of the problem. It is a review as to whether the agencies complied with those procedures, and that is what I think would give meaningful relief.

Mr. REED. Thank you, Mr. Chairman.

Mr. GEKAS. Does anyone else seek recognition?

Mr. Barr of Georgia.

Mr. BARR. Thank you, Mr. Chairman.

I appreciate both the oral and written testimony of these two witnesses. It is very thoughtful and has some specific examples, which I appreciate.

My only criticism is Mr. Glover uses some words in here that I have never heard of before. What does "repastinate" mean?

Mr. GLOVER. Barry, you want to?

Barry Paneles who has been enforcing Regulatory Flexibility Act for some years, is our linguist in the Office, and his vocabulary far exceeds anyone I know.

Mr. BARR. It certainly exceeds mine.

I would like to follow up on just a concluding discussion concerning whether or not the proposed amendments here should apply to large businesses as well as small ones. My predisposition is to say that if a proposed regulation affects large business, they certainly should have the opportunity for judicial review, just as a small business. If a proposed regulation affects them, large businesses should be granted judicial review.

But I certainly am sensitive to the point that both of you have raised which is that this could have an adverse effect on the ability of small businesses. And I am not quite sure that I understand. I

had already made some notes here, Mr. Glover, of your footnote 13, on pages 19 and 20, but I am still not quite sure why the result here is a bad one; if you allow both large and small businesses to have an equal bite at the apple.

Mr. GLOVER. The Regulatory Flexibility Act was passed back in 1980. It came out of the White House conference, and the perception by the small business people and the realization by the small business and, quite frankly, by the Government, that it had done a very bad job of considering small business.

There is no question, large firms that are affected by regulations have lawyers, have economists, have compliance experts, and get involved in regulatory process and have their views heard on any regulation that significantly affects them. On the other hand, small businesses don't have the resources to get into the regulatory process and the Government did not do the outreach, and part of the Regulatory Flexibility Act requires the Government to go out and reach to small businesses and bring them into the regulatory process.

But even independent of all that, to look at and have government economists analyze the impact on small businesses, what was happening is Congress and the agencies did not know why the regulations they were passing had any impact on small business. They simply never looked at it.

In large part, my office or the Office of Advocacy, was created in 1976 because Congress recognized that small business didn't have a strong voice, didn't have the economists, didn't have the lawyers to represent them. As a follow-on from our offices, one of the recommendations the Office of Advocacy made, which was adopted by the White House conference in 1980, was to pass the Regulatory Flexibility Act to force the agencies, because we recognized we couldn't do it by jawboning and we hoped the Regulatory Flexibility Act would give enough power and direction to the agencies to do that. And in the first few years by and large, it was a dramatic improvement.

Over the years, there was erosion, as often will happen when there is no judicial review as a club. So the reports to the Chief Counsel by and large, were filed and ignored by everyone. The agencies ignored them. The administration ignored them. And the Congress ignored them. And what we have now reached is a cumulative effect of all these regulations over a long period of time, are now so burdensome, so it is designed to correct a procedural problem that existed.

Large firms don't need to have the Office of Advocacy there to represent their views nor do they need the procedure that forces them to go out—the agencies to go out to small business and bring them in. So I think that the point I am trying to make very clearly, is to allow big businesses to defeat agencies doing something good for small businesses only defeats the intent of the Regulatory Flexibility Act.

They clearly have the rights and they certainly do that in the Administrative Procedure Act, to challenge government regulations. They do it all the time. And, quite frankly, they have won a lot of battles when the agencies don't take those things into consideration. This is a purely small business process designed to cor-

rect a market anomaly in the political process where we simply didn't have the views represented.

Mr. SPOTILA. If I may add to that, and I completely agree with what Jere has indicated. One of the interesting findings we came across last year, in the regulatory analysis interagency effort that I talked about, in focusing on specific industries, is that more than one small business owner made the point, and it was agreed to by regulators, agency personnel from the regulating agencies, that large entities often like more regulation.

They like things that are complicated because it gives them a competitive advantage over their small entity competitors. So it is something that we need to be sensitive to, and we don't want to see a distortion in the process by losing the focus of the Reg Flex Act.

Mr. GEKAS. The time of the gentleman has expired.

The gentleman from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman.

Just a couple of questions.

Mr. Glover, do we have a good definition of what indirect means?

Mr. GLOVER. I think the courts have looked at the word "indirect" and I think the courts given the docket and the things that are going on, that indirect costs are something that the courts are probably not going to look at very hard no matter what the language is, because they have enough trouble finding direct costs and quantifying direct problems. The courts, regardless of how the statute works, they are probably going to focus their attention to the direct effects.

Mr. SCOTT. If you allege only standing to get into court, if you just have indirect effects, should you be able to get into court?

Mr. GLOVER. Well, I think the standing issue is the courts have had a pretty good ruling as to what the zone of protection is intended to be. And the courts are going to look at the standing issue historically, and they are going to be inclined to look at those directly affected under existing standing law. They will, obviously, if you put the word "indirect" in there, they will look at it, but unless it is clearly quantifiable and identifiable as indirects, that would come under the zone of protection, it is unlikely the court would spend a lot of time on indirects.

Mr. SCOTT. Did you make a comment on time limits for bringing suits?

Mr. GLOVER. I did not. I think the time limits under the existing Administrative Procedure Act are usually 60 days. Mr. Spotila said taking it out 6 months or a year would be more appropriate. I think that is one of those issues whatever makes the bill pass the fastest, is appropriate. But clearly, the 6 months, in most cases, we did analysis of it and virtually all statutes require challenges to be made under the Administrative Procedure Act within 60 days of the final rule being effective.

Mr. SCOTT. What about a requirement for prior comments?

Mr. GLOVER. The—

Mr. SCOTT. The administrative hearings.

Mr. GLOVER. The *Portland Cement* case basically comes down and says that you must file comments prior—if you don't file comments below, the courts won't entertain them at a higher level.



Again, these are the technical administrative kind of details, I think the courts have looked at that issue. Regardless of which way we put it in the statute, they are going—the courts are going to follow the law that is pretty well established on how that is going to be handled.

Mr. Ewing said the law was pretty well established. I think some of the things Mr. Spotila was mentioning is simply codifying the case law that is in existence today.

Mr. SCOTT. In administrative procedures, the gentleman from Rhode Island mentioned the scope and standard. What kind of remedies do judges come up with when they have got a case before them?

Mr. GLOVER. Well, under the Regulatory Flexibility Act, they simply say we don't have judicial review. And so, therefore, we aren't, but the APA, the APA does often strike down regulations. They strike down regulations in part, and/or they refer them back to the agencies to be reconsidered.

They have a wide variety of possible remedies that they can afford, given the set of facts and the regulations before them. They tend to pick and choose on a fairly free basis.

Mr. SCOTT. And what happens to the underlying law while this is going on?

Mr. GLOVER. Well, the underlying law would remain in effect. The regulations would be what you would be challenging, so those regulations sometimes stay in effect. The parts that aren't covered, it varies from case to case. It is a purely case-to-case determination.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. GEKAS. The gentleman from Ohio is recognized for 5 minutes.

Mr. CHABOT. Thank you, Mr. Chairman, one very quick question. Do you have specific language that delineates what the difference between big business and small business is, either dollar amounts per year in business or numbers of employees or whatever?

Mr. GLOVER. No, sir. That is in the law intentionally left to the agencies.

And what we say is in one case, it may be appropriate to look at under 20 employees. It may be another case, to look at the volume of the effluent or pollutants that are put into the air or water. In another case—looking at it and make a determination based on what you are proposing to do and what the situation is.

So the Regulatory Flexibility Act allows and, in fact, encourages an agency not to come up with one definition, but often to air the regulations and come up with multiple definitions. So in some cases, for example, we are working with the EPA on one particular regulation that they have come out with.

They granted a 500-pound exemption for reporting on toxic reporting, inventory reporting. And what we are negotiating with them and trying on less toxic matters is to raise that number from 500 pounds to 1,000 pounds. So it varies, and it depends on the context in which it comes up. And I think that is the way it should be, and it may be multiple definitions, depending on the situation, as are appropriate. That part of it has worked very well.

Mr. CHABOT. Let me just ask one followup question. Wouldn't it be difficult for a business owner to determine whether they are big or small, whether they would have relief here or judicial review or not?

Mr. GLOVER. It really hasn't seemed to be a problem. And when we worked, and we worked closely with EPA through the years, and with other agencies, we usually can come up with something. In absence of any other determination, SBA has cited standards it has addressed through the years. And there is a provision that the agency should use the SBA definition, if there is no reason to do a different definition. So there are clearly established regulations that have been in effect for a good while that seem to work pretty well.

Mr. CHABOT. You—

Mr. BARR. Would the gentleman yield?

Mr. CHABOT. I will yield to the gentleman from Georgia.

Mr. BARR. Just very quickly, Mr. Chairman.

Specifically, on the context of what we were talking about earlier with regard to whether or not judicial review—whether that ought to be provided to big businesses as well as small businesses—would it not be necessary to follow through on what you have recommended here to have something a little more specific and definitive with regard to who can take advantage of the relief that we are proposing to grant here?

Mr. GLOVER. I think the existing procedure has worked quite well in that situation. I don't think there has been a problem. I think we have got definitions in place. And where it is more appropriate to use a different definition, we have done that.

Of all the criticisms that my previous chief counsels have addressed in their reports, and that I have run into, I have not heard of a situation where the definition was the problem. We did point out one problem we had with one agency, the Federal Communications Commission, and how they were defining things, and they have now come into compliance with that, but that was an unusual situation. It is the only time it has occurred, and they did come into compliance fairly quickly.

Mr. BARR. I thank the gentleman for yielding.

Mr. CHABOT. I yield back the balance of my time.

Mr. GEKAS. I thank the gentleman.

We thank the witnesses, who have encouraged us with their testimony to delve more closely into some of issues that have been raised. Thank you.

The next panel consists of people who are in the trenches themselves. They are representatives of small business: Joseph Stehlin from Jacksonville, FL; Rick Stadelman, who brings a special knowledge having to do with the relationship between small business and local government to the table; and Bennie Thayer, the president of the National Association of Self-Employed, who is a small businessman himself in Washington, DC. We will ask Mr. Stehlin to lead the testimony.



## STATEMENT OF JOSEPH STEHLIN, PRESIDENT, GREEN COVE MARITIME, INC.

Mr. STEHLIN. Mr. Chairman, distinguished committee members, ladies and gentlemen. I am Joseph Stehlin, President of Green Cove Maritime, Jacksonville, FL. On behalf of the other similar small businesses in the United States, I would like to thank you for the opportunity to describe the impact of administrative regulations on small business.

Green Cove Maritime is a small family business, performing cargo-handling services for shipping companies in Florida. We initially created jobs for a family of six. Up to now, we have more than 142 associates in a maritime liner service.

We also conduct stateside management of several small ships used by shipping companies. Green Cove Maritime interacts with a multitude of government agencies which promulgate regulations concerning all facets of the shipping business.

When one of these small cargo vessels enters the port of Jacksonville to discharge and receive cargo, the turnaround can be as quick as 8 or 12 hours for small international trading companies like Green Cove, the number of Federal regulations to be satisfied in a few hours is really astounding.

The list of agencies and regulations of the U.S. Coast Guard, Department of Transportation, Customs Service, Immigration Naturalization, Environmental Protection, Federal Trade Commission, OSHA, and with all candor, Mr. Chairman, there are probably a lot others we maybe don't even know about.

Of more dramatic impact to small companies like Green Cove, though, is not necessarily the volume and scope of representation, but rather the problems which these regulations have created.

Not only does there seem to be little appreciation sometimes for the economic dislocations caused by new regulations, there is less appreciation for the dislocations caused by different interpretations of existing regulations. I would like to provide you with a description of a recent episode which involved the Coast Guard and one of our small ships. This really happened only just a few months ago.

For 8 years, one of our vessels operated out of Jacksonville on a weekly sailing schedule. The vessel had been routinely inspected by the Coast Guard during this period, and we are inspected two, three times a year on all of our other ships.

The vessel on a Friday afternoon, hours before the ship was scheduled to depart on our published schedule, a Coast Guard inspection team boarded the vessel and reported that a major deficiency had been discovered. Now, mind you, they had been boarding the ship for 8 years. This discovery was that the vessel was only manned with two merchant marine deck officers as specified by its manning document.

The U.S. Government would apply a different standard requiring three deck officers, the same vessel that operated out of the port every week for 8 years. No statute, no administrative ruling concerning manning requirements had changed during the period. The only thing which had changed was the administrative agency's interpretation of existing regulations.

To our knowledge, no hearings were held, no proposed rule-making, no notices, no opportunity to solicit input concerning the impact of what they were going to do.

We were given 1 week to recruit, interview, hire, and transport a qualified deck officer to join the vessel on our next scheduled visit to the port. A qualified mate was finally located and we had him at the port the next week.

The Coast Guard, when the vessel came back and the mate was standing there said, "oh, we didn't get the mate fast enough" and they assessed a \$25,000 penalty against our little firm.

Now, \$25,000, in a business our size, is a tremendous amount, and we operate on very narrow margins. Plus, of course, having to have an extra mate on board the vessel gives a dramatic impact and increase in the cost of operating a liner service out of Jacksonville.

We emphasize that the issue is not whether the Coast Guard has an important and vital role to play in the promotion of safety on American waterways. We support the effort. The concern is simply the process by which their policy is formulated.

For example, would the economic impact to higher manning requirements for local coastal freighters be better spent in other areas, such as safety training or navigation equipment? Agencies such as the Coast Guard are best served by having the benefit of feedback from their regulated constituents who share common interests in their mission.

Clearly, more participation is needed, including notice of proposed rulemaking and notice of changes in discretionary enforcement, and an awareness of the economic ramifications which agency decisions have upon small business. With such participation, there will be a more rational, more productive impact upon small business and a more effective rationalization of the agency's goal.

Mr. Chairman, on behalf of small businesses everywhere, we support the committee's efforts to create a greater emphasis on the part of government to rationally evaluate the economic impact of rulemaking and rule enforcement on small business.

Mr. GEKAS. Thank you, Mr. Stehlin.

[The prepared statement of Mr. Stehlin follows:]

PREPARED STATEMENT OF JOSEPH STEHLIN, PRESIDENT, GREEN COVE MARITIME, INC.

Mr. Chairman, distinguished committee members, ladies and gentlemen.

I am Joseph Stehlin, President of Green Cove Maritime of Jacksonville, Florida, on behalf of other similar small businesses in the United States, I would like to thank you for the opportunity to describe the impact of administrative regulations on a small business.

Green Cove Maritime is a small family business which provides cargo handling services for shipping companies in Florida. We initially created jobs for a family of 6, now our company numbers more than 142 associates in a maritime liner service. We also conduct the stateside management of several small ships used by the shipping companies.

Green Cove Maritime interacts with the multitude of Governmental agencies which promulgate regulations concerning all facets of the shipping business.

When one of these small cargo vessels enters the Port of Jacksonville to discharge and receive cargo, the turnaround time can be as quick as 8 or 12 hours. For small international trading companies like Green Cove, the number of Federal Regulations which must be satisfied in those few hours is simply astounding.

The list of agency regulations to which we are subject includes; 1) The United States Coast Guard and the Department of Transportation; 2) United States Customs Service; 3) The Immigration and Naturalization Service; 4) The Department

of Agriculture; 5) The Federal Maritime Commission; 6) The Interstate Commerce Commission; 7) Environmental Protection Agency; 8) Federal Trade Commission; 9) Occupational Health and Safety Administration, and with all candor, Mr. Chairman, at any given moment there are probably many others; but no one, including the Government, can ever really be sure. There are just too many to keep up with.

Of more dramatic impact to small companies like Green Cove, though, is not necessarily the volume and scope of the regulations, but rather the process by which these regulations are created. Not only does there seem to be little appreciation for the economic dislocations caused by new regulations, there is even less appreciation for the dislocations caused by different interpretations of existing regulations.

If I may, I would like to briefly provide you with an anecdotal description of a recent episode which involved the Coast Guard and one of our small ships. For eight years, one of the vessels had operated out of Jacksonville on a weekly sailing schedule. The vessel had been routinely inspected by the Coast Guard during this period; dozens of times in fact. On a Friday afternoon, hours before the ship was scheduled to depart on her published schedule, a Coast Guard inspection team boarded the vessel and reported that a "major deficiency" had been discovered. That discovery was that although the vessel was manned with two merchant marine deck officers, as specified by its own manning document, the U.S. Government would apply a different standard requiring three deck officers. This same vessel had operated out of the Port of Jacksonville every week for eight years with two deck officers. No statute, and no administrative rule concerning manning requirements had changed during this period. The only thing which had changed was the administrative agency's interpretation of existing regulations. To our knowledge, no hearings were held, no proposed rulemaking notices were issued, and no opportunity to solicit input concerning the impact of this change was afforded to anyone.

We were given one week to recruit, interview, hire, and transport a qualified deck officer to join the ship upon her next scheduled visit to the port. Although a qualified mate was able to meet the vessel in Jacksonville during her next weekly scheduled port call, the Coast Guard assessed a \$25,000.00 penalty against the ship for entering the port without the new manning requirements being satisfied. In a business which operates on very narrow margins, the pending fine and 50 increased manning expenditures has had a dramatic impact upon us as the ship's manager.

We emphasize that the issue is not whether the Coast Guard has an important and vital role to play in the promotion of safety on American waterways. We support that effort. Our concern is simply the process by which their policy is formulated. For example, would the economic impact of higher manning requirements for local coastal travel be better spent on other areas such as safety training or navigation equipment? Agencies such as the Coast Guard are best served by having the benefit of feedback from their regulated constituents who share a common interest in their mission. Clearly more participation is needed, including notice of proposed rulemaking, and notice of changes in discretionary enforcement, and an awareness of the economic ramifications which agency decisions have upon small business. With such participation, there will be a more rationale, and more productive impact, upon small business, and a more effective realization of the agency's goals.

Mr. Chairman, on behalf of small business's everywhere, we support your committee's efforts to create a greater emphasis on the part of the Government to rationally evaluate the economic impact of rulemaking and rule enforcement upon small business.

Mr. GEKAS. We will now hear from Mr. Thayer, who will supplement that testimony, before we hear from Mr. Stadelman on the relationship with local governments.

#### **STATEMENT OF BENNIE L. THAYER, PRESIDENT, THE NATIONAL ASSOCIATION FOR THE SELF-EMPLOYED**

Mr. THAYER. Thank you so much Chairman Gekas, and Mr. Reed, and other members of this distinguished subcommittee.

My name is Bennie Thayer. I am here today wearing two hats. One, I have been a small business person all of my adult life and presently am a small business person. In addition, I am also the president of the National Association for the Self-Employed, an organization representing over 300,000 small business persons across this country. So it is in both of those capacities that I appear before you today.



First, gentlemen, in my capacity as a small business person, one of my first businesses was a 7-Eleven franchise store not far from where we are right now. In fact, on 13th Street, just here in Northeast Washington; 421 13th Street.

My wife and I bought that franchise, started that business, and it was a family, not only, owned, but run business. It wasn't very long before I discovered that my franchisor, in addition to being my partner and placing upon me just burdensome regulations, that also I had government entities who were also my partners in that business, and most notably the IRS.

I think if you would ask most small businesses which agency is the one that causes us most problems, it would be the IRS. But be that as it may, we operated that business for a period of years, sustained quite a few problems, and again as I said, not far from here, finally being audited by the IRS, and in the end, making a decision that we must sell that franchise if, indeed, we were to salvage our home, which we had put up to borrow money to go into that store, so that we could not only take care of the IRS, but some other things.

I spent most of my time while operating that business indeed trying to address the various regulations from the various agencies, not only locally here in the District of Columbia, but also from the Federal level.

I went from there into a second business, known as Diversified Concepts, Inc. Prior to going into that business, I did a considerable amount of screen printing, and that business was in my home garage, and trying to make a living. We did very well in my home garage and were very successful as a home-based business. But as most entrepreneurs, I wanted to grow that business, so I stepped out from my home and went into Maryland and opened a business, actually, in a storefront.

While much to my chagrin, I found out that I not only then continued to have my partner, the IRS, but I gained a new partner in this particular business and that partner was OSHA.

It was OK to operate that business in my home, as a screen printer, which many operate today, and not once, did I have OSHA or anybody, and we were a registered business, come to my home and say anything about how I disposed of solvent and other things. The minute we went into a storefront business, that was the case. Not only did that become the case, but the myriad of regulations that were placed upon us in how we had to store the solvent, where it could be stored, eventually led to my making a decision that I cannot take this anymore, and we sold that business.

Presently, I operate a telecommunications business. I am the chairman and chief executive officer of Lightcom International, Inc., which is a small telecommunications business that provides private line service for both the Government and commercial entities to some 39 countries right now.

I gained a third partner. Now, I still have my IRS partner, and I still have my OSHA partner, but now I find that the FCC has become my partner in this business. And I submit to you that those of us who are attempting to survive as in the telecommunication industry and who are indeed small businesses, the smallest of small, will not be able to survive unless the agencies like FCC and

others start to indeed discern what is the impact of these regulations, upon people like Lightcom International, who are struggling to survive in an industry that is really occupied by the giants of the world.

With that being said, I would like to—after giving you my personal experiences, speak a little bit about my position as the president of the National Association for the Self-Employed. The concern over regulatory flexibility reform has become even greater, gentlemen, since I became the president of the National Association for the Self-Employed.

Our membership, the members of the NASE have been crying out for a cease-fire on government regulations now for years. The NASE recognized that there was a need for strengthening, if you will, the Regulatory Flexibility Act of 1980, and I am going to focus my remarks today on one title—one portion of this act, which is title VI, the judicial review component of it.

First of all, let me say that we chose to be a founding member of a coalition of some 57 small business associations who have fought hard for this, and for this reason, we commend the Judiciary subcommittee for your hearing here today.

One of the things that you have heard is that there will be a myriad, if you will, of lawsuits, there will be more legalization and escalation of lawsuits if, indeed, judicial review is passed. I would like to address just, if you will, for a few moments that argument.

Back when judicial review was passed, there was another bill when the Regulatory Flexibility Act was passed, excuse me, back in 1980. At the same time, there was another act passed and that was the Equal Access to Justice Act. And at that time, everybody said that act was going to just unleash a lot of litigation and it, too, was going to cost us all kinds of money and with people coming into the court system.

It was originally estimated that the Equal Access to Justice cases would cost the Federal Government more than \$100 million a year in legal fees alone. In 1991, Federal agencies had a total caseload, gentlemen, of over 390,000 cases. However, only 48 of those were equal access to justice applications. Of about 130,000 Federal civil cases tried under the relevant statutes that year, of the Equal Access to Justice Act, applications were granted in 253 cases, at a total cost of the \$1.2 million.

Now, this was far less than the \$100 million projection that had been put forth at the outset in 1980 when he started to consider the legal impact. I submit to you today that will be the same—that will be the same case if you pass judicial review to the fullest, to its fullest extent.

We are asking in the NASE that you do that, that the judicial review component of the present bill, H.R. 9, be kept intact, that it be passed as it is, and we submit to you that you will not see an escalation of the legal cases. Just as you did not see it with the Equal Access to Justice Act.

Gentlemen, I appreciate once again the opportunity of addressing you. And I have submitted more lengthy remarks which address other components of the Regulatory Flexibility Act, which I would hope would be submitted for the record.



Mr. GEKAS. Without objection, we will consider and accept it for the record.

Mr. THAYER. Thank you.

[The prepared statement of Mr. Thayer follows:]

PREPARED STATEMENT OF BENNIE L. THAYER, PRESIDENT, THE NATIONAL ASSOCIATION FOR THE SELF-EMPLOYED

Chairman Gekas, Ranking Member Jerrold Nadler and members of the Subcommittee, thank you for inviting me to testify today. My name is Bennie L. Thayer and I come before you today as a man wearing two hats. I have been asked to appear before you both as the President of the National Association for the Self-Employed and as a small-business man.

We are here today to discuss the Reg Flex provisions found in the Contract With America. Title VI of the Contract would strengthen the Regulatory Flexibility Act in a number of ways, first and foremost by providing for judicial review of the RFA. I have been a small-business man all of my adult life and I can tell you from personal experience that regulatory burdens leave a working man with a lot of headaches and very little time to conduct business.

I used to own a 7-Eleven franchise on 13th St., NE here in the District. I completely understand what it means to be over-regulated and buried in a sea of paperwork. Between the IRS and the franchisor, it seems as if I spent all my time doing paperwork. My wife and I were managing fine with the store, paying our taxes, complying with regulations and keeping the government happy—or so we thought. When the time came for us to sell our store, the IRS told us that we owed \$55,000 in back taxes. If you ask the average business owner which federal agency contributes the most to regulation and paperwork burdens, the answer will usually be the IRS.

When I began Diversified Concepts, Inc., I became acutely aware that I had a new "partner" I hadn't anticipated, OSHA. DCI was a small business that specialized in trophies, plaques and screen printing. For the screen printing alone, there were numerous regulations on how to store, move and dispose of the solutions we utilized. I was forced to buy a special machine to dump the used solution into, as I was not allowed to dump it down the sink. Since the solutions used in screen printing are also flammable, you could count on a visit every other month from the Fire Marshal. Now I understand the ideas of safety but sometimes I think even OSHA gets carried away.

I considered DCI to be a seasonal business, as Christmas and other major holidays tended to be our biggest selling times. For this reason, I hired temporary workers or when time didn't allow me to do a job myself, I would hire an independent contractor to finish a project for me. Both of these practices landed me in trouble with the IRS.

As you can see through my personal experiences I know what it is like to be overburdened with paperwork and regulations. The concern over Regulatory Flexibility Reform became even greater when I became the President of the National Association for the Self-Employed. The NASE represents over 300,000 small business persons throughout the United States. Over 85 percent of the NASE members are business owners with 5 or fewer employees. The membership is involved with a very wide range of businesses, notably in the consulting and retail fields.

The members of the NASE have been crying out for a cease-fire on government regulations. The NASE recognized that there was a need for strengthening the Regulatory Flexibility Act of 1980. Therefore, the NASE is one of the founding groups of the Regulatory Flexibility Act Coalition, a broad coalition of 57 small business and small governmental associations. Altogether, the Coalition represents more than 5 million small businesses and over 13,000 small local governments.

H.R. 9, THE JOB CREATION AND WAGE ENHANCEMENT ACT OF 1995

I am very familiar with the harmful impact that burdensome regulations can have on the ability of a business to grow and thrive in today's economy. For this reason, we commend the Judiciary Subcommittee on Commercial and Administrative Law for holding this hearing on the Regulatory Flexibility reform provisions of H.R. 9, the Job Creation and Wage Enhancement Act of 1995. These provisions are identical to H.R. 830, the bill introduced last Congress by Representative Tom Ewing and co-sponsored by over 250 members of the House, including Chairman Gekas and Representatives Hyde and Inglis. Sixty-seven Senators voted in favor of an RFA amendment in 1994 as part of S. 4, the Senate version of the National Competitiveness Act. Also, 380 House members voted last year to support a nonbinding resolution

calling for approval of the RFA provisions of S. 4—a resolution authored by Representative Robert Walker. We were also pleased to see that the Clinton Administration lent its support last year to strengthen the RFA in two separate recommendations by Vice President Gore's Reinventing Government Task Force.

This support is a welcome reminder of the backing the Regulatory Flexibility Act has long enjoyed. Introduced in the Senate in 1977 by Senators John Culver (D-IA) and Gaylord Nelson (D-WI), the RFA was unanimously reported and passed by the Senate late in 1978. In 1979, the bill was introduced and championed in this Committee by Rep. Bob Kastenmeier (D-WI). It enjoyed wide bipartisan backing in both chambers. It was a top recommendation of President Carter's White House Conference on Small Business in January, 1980 and was passed overwhelmingly by Congress and signed into law by President Carter later that year.

The Regulatory Flexibility Act has enjoyed strong support because it is a responsible approach to a very real problem. Every member of Congress has heard the vigorously expressed concerns of small business and small government constituents regarding federal regulations and paperwork. Federal agencies that comply with the RFA properly can go a long way toward addressing that public concern—yet can do so without compromising their missions or their legal obligations. For members of Congress, the Act can provide a channel for turning constituent complaints about “the bureaucracy” into constructive solutions.

But to accomplish this, the RFA must be a law Congress and constituents can depend on. Unfortunately, that has become less true over time. Change is needed.

#### HOW THE REGULATORY FLEXIBILITY ACT IS DESIGNED TO WORK

The Regulatory Flexibility Act is designed to address a very significant problem. The drafters of regulations normally find it simpler to promulgate “one-size-fits-all” regulations, as opposed to taking the time to analyze whether different rules should apply to different segments of the population. Of course, regulating everyone in exactly the same way is sometimes the right thing to do. Rules of general applicability are sometimes necessary to protect public health and safety, for example. But because regulators find such uniform rules more administratively convenient, they may be inappropriately used. In many instances such inflexible rules can violate common sense, simple fairness and economic efficiency. The Regulatory Flexibility Act addresses a particularly troubling aspect of “one-size-fits all” rulemaking—the misapplication of uniform rules to small businesses, small non-profit organizations and smaller jurisdictions of government. The RFA tells rule writers to think about the effects of their actions on these “small entities.” Whenever possible and consistent with their underlying legislative mandates, the rulemakers should seek alternatives that are less burdensome for these small entities.

The most obvious reason why doing this is sound public policy is that these “smaller entities” may not be the sources of the problems the agencies are trying to address in the first place. For example, using RFA analyses, the Environmental Protection Agency has been able to identify small businesses which do not create health or environmental problems, and exempt those businesses from the requirements imposed on other, larger businesses which do create health and environmental problems. Scores of EPA regulations have been structured in this way.

A second reason why agencies should weigh their regulatory impacts on small entities is that small entities typically lack the resources and in-house expertise to do so themselves. Indeed, small entities very often are unaware of pending regulations. Even when small entities do comment on proposed rules, they tend to do so without help from the kind of attorneys, accountants, economists, and compliance specialists that larger entities can afford.

The key economic problem is the disproportionate costs involved. Rules which impose the same costs on everyone work a special hardship on small entities because small entities must spread those costs over fewer employees, fewer units of production, fewer taxpayers and smaller revenues. Thus, rules imposing identical expenditures on large and small entities tend to raise costs more for the small. One Small Business Administration study suggests that, on average, *small businesses pay three times more per employee than big businesses to comply with the same regulations.*

The RFA also helps because the public interest is enhanced whenever agencies write sound regulations that are the result of reasoned analysis and an open process of public notice and comment. Both regulatory reasoning and public input can be improved by using the RFA. This improved information, in turn, can help agencies use their limited resources more efficiently by designing regulations that can be complied with and that devote the most attention and resources to the most serious problems.

To help achieve its purpose, the Act empowers the SBA Office of Advocacy to receive proposed and final regulations, to comment on rules, to seek enforcement of the RFA within the federal government, and to file *amicus curiae* briefs in judicial proceedings involving rules impacting small business.

#### WHAT THE REGULATORY FLEXIBILITY ACT DOES NOT DO

It is important to note what the RFA does not do. It does not specify what rules an agency may or may not write. It does not override an agency's substantive legal responsibilities. Above all, it does not tell an agency what its rules should say. Section 606 of the RFA explicitly states that the RFA's analysis requirements "... do not alter in any manner standards otherwise applicable by law to any agency action." As with the rest of the Administrative Procedure Act, of which it is a chapter, the RFA specifies procedures which must be followed—nothing more, nothing less.

#### THE NEED TO REVISE THE RFA

Unlike the rest of the Administrative Procedure Act, and indeed, unlike virtually every other statute agencies must observe, the RFA severely restricts judicial review. Section 611(b) states that the Regulatory Flexibility analyses prepared under the Act shall not be subject to judicial review—but then goes on to say that these analyses do constitute part of the agency's rulemaking record, which a court may examine. This murky reasoning has led to judicial confusion in interpreting the statute. This in turn has meant that the many agencies sincerely attempting to comply with the RFA have had little judicial guidance in interpreting the statute. Worse, it has led to an apparent belief on the part of some agencies that compliance with the RFA is entirely voluntary.

The most frequently encountered agency violations of the RFA—the kind one finds in any copy of the Federal Register—are these:

- Proposed or final rules which omit any mention of the RFA;
- Rules which assert a lack of impact on small entities, but offer no reason for this assertion;
- Agency claims of broad exemptions from the RFA; and
- Rules which acknowledge an impact on small entities, without any accompanying efforts to lessen that impact or explain why doing so would not be feasible.

Other testimony presented to the Committee today may document a large number specific agency compliance problems, ranging from unjustified waivers under Section 605(b) of the Act to the blanket exemption claimed by the Internal Revenue Service. Perhaps two items will provide some context, however.

#### ITEM 1. "SECTION 89"

In 1988, the Internal Revenue Service proposed new regulations under Section 89 of the Internal Revenue Code. These regulations would have dealt with tests and data collection required of businesses to prove nondiscrimination in employee benefit plans. In the opinion of many in the small business community, as well as SBA's Office of Advocacy and a number of members of Congress, the objectives of Section 89 could have been met with far fewer paperwork and compliance burdens on small business than the IRS was proposing. However, the IRS maintains that virtually all of its rules are "interpretative" and therefore completely exempt from the RFA. So substantive comments and recommendations made by members of Congress, the small business community and the Office of Advocacy to the IRS for reducing the small business burden of the Section 89 regulations were ignored. Yet a judicial challenge under the RFA was not possible. The IRS' decision to press forward with the regulations as proposed led to the rapid emergence of a national grassroots movement to strike down Section 89. Congress was forced to intervene, and the issue mushroomed into a bitter election-year battle involving six Congressional committees, thousands of constituent visits and millions of pieces of mail. In the end, Section 89 was repealed altogether. It is not too much to say that if the IRS had conscientiously applied the RFA, or if the threat of judicial review of the RFA had been available, the entire episode could have been avoided.

#### ITEM 2. THE REVIEW OF EXISTING REGULATIONS

Section 610 of the RFA requires every agency to review its existing rules over a ten-year period, beginning with the effective date of the Act, and to delete or simplify those rules which impose unnecessary burdens on small entities. The deadline for this occurred on January 1, 1991—that is, 4 years ago. To date, not one agency



has fully complied with this legal requirement. Not one. Not even the SBA. Most agencies have not put a single regulation through this ten-year review.

As these items, and the other evidence before the Committee should suggest, a major problem exists with RFA compliance. The normal mechanism for forcing compliance with a law is the threat, or reality, of a lawsuit. This has not been possible with the RFA. The existing judicial review formulation in the Act, Section 611(b), simply has not worked. The courts are confused about what it means, individual agencies feel free to excuse themselves from the law at will, and every single agency of the federal government has ignored a major provision of the statute over the last fourteen years.

#### JUDICIAL REVIEW OF THE RFA

Judicial review of the RFA is not an end in itself, but rather a means to an end—strengthening agency compliance with the law. Small businesses do not typically have the resources to sue federal agencies; they are unlikely to do so except in extraordinary cases. But the threat of judicial review, even if remote, could vastly improve the seriousness with which the RFA is treated by the agencies and therefore the effectiveness of the law in solving the national problem to which it is addressed. Perhaps there is another way, besides judicial review, to permanently and effectively deter agency non-compliance. If so, the small business community would be happy to consider it. But so far we have not heard of such an alternative. And it is surely striking that virtually every other law governing agency administrative procedures deters non-compliance through the threat of judicial review.

Having stated this, it is important to note that unlimited judicial review is not the NASE's goal. We do not seek interlocutory review, as was granted in agency rulemakings under the National Environmental Policy Act (NEPA). We are more than willing to work with Congress in shaping careful legislative language on judicial review, to prevent the RFA from being abused. But any proposal for revision of the RFA which leaves intact the current gridlock on judicial review will not be acceptable to the NASE. Congress must not condone continued agency flaunting of this Act.

It is possible that an initial flurry of lawsuits could be filed under the RFA after judicial review is permitted. If so, it would likely be a short-lived phenomena. Once the courts render their first round of decisions regarding acceptable and unacceptable agency conduct, and once those boundaries are well understood by the administrative law bar, such cases would probably diminish sharply. Both agency general counsels and plaintiffs attorneys would understand how much discretion the courts would be willing to allow the agencies. And both could be expected to respect those boundaries. There are, of course, sanctions which the courts employ against the flag of frivolous lawsuits.

Judicial review of RFA is not likely to lead to excessive litigation or a "clogging of the courts." Small businesses and governments simply do not have the time and resources to sue federal agencies over anything less than egregious violations. Attorneys want to avoid risking the reprimands or fines resulting from filing trivial federal lawsuits, and the federal courts themselves are not willing to waste their own time on inconsequential matters.

It is worth noting that even greater fears about excessive litigation were expressed when another small business related law, the Equal Access to Justice Act, was passed at about the same time the RFA was. When the Equal Access to Justice Act was enacted to simplify the award of attorney's fees, a flood of lawsuits was expected. This simply did not happen.

It was originally estimated that Equal Access to Justice cases would cost the federal government more than \$100 million dollars a year in legal fees alone. In 1991, federal agencies had a total adjudication case load of over 390,000. From this total adjudication case load, only 48 Equal Access to Justice applications were granted, at a cost of about \$433,000. Of about 130,000 federal civil cases tried under relevant statutes that year, EAJA applications were granted in 253 cases at a total cost of \$1.2 million. Both figures combined are significantly lower than the initial \$100 million projection. Therefore, we believe that granting judicial review to the Reg Flex Act will not result in an influx of law suits.

Another potential check on judicial review which the Committee might wish to explore is authorizing the Office of Advocacy to assist other agencies in drafting their procedures for RFA compliance. (This could be similar to the role EPA performs now in assisting other agencies as they draft their environmental compliance procedures.) An agency which then followed Advocacy-approved RFA procedures could use Advocacy's approval as a defense in court.

## INDIRECT EFFECTS OF RULES

Another crucial improvement that is necessary to make the RFA function properly, in the NASE's view, is getting agencies to assess indirect as well as direct consequences of rules. It is not simply the effect of individual rules in isolation which burden small entities, but the cumulative effect of all rules. Agencies need to be far more sensitive to the reporting and compliance requirements already imposed on small entities as they consider new requirements. Agencies also need to understand that a rule which threatens the viability of a small business' suppliers or customers, or a small government's tax base, also threatens that small business or small government. To be more aware of these indirect effects, agencies should develop their own in-house pictures of the populations they regulate and should work closely with the SBA Office of Advocacy, to make use of its data bases. H.R. 9 also addresses this problem.

## ADVANCE NOTIFICATION OF RULEMAKINGS

The requirement, under Section 602 of the RFA, for agencies to provide Advocacy with regulatory agendas, so as to allow Advocacy to anticipate rulemakings, has not worked properly. The agendas have not been produced in a timely manner, and the descriptions of planned rulemakings often have been vague or inaccurate. This problem is not entirely the fault of the agencies. Six-month advance agendas by their nature are often tentative. Priorities change, legislation changes, sudden needs arise. One approach to remedying this problem—that taken by H.R. 9—is to require agencies to provide Advocacy with advanced notification of specific rulemakings. This problem, too, deserves Congress attention if the RFA is to be fully effective.

## AMICUS RIGHTS OF THE OFFICE OF ADVOCACY

The filing of *amicus curiae* briefs by the Office of Advocacy in selected legal cases is necessary, not only to give "moral" assistance to beleaguered individual small businesses, but to alert the courts to cases where key questions of principle are at issue. That is why Congress took the extraordinary step, in Section 612(c) of the Act, of *directing* the Courts to accept such an intervention by the Office of Advocacy. Yet no such *amicus brief* has ever been filed by the Office of Advocacy. H.R. 9 seeks to remedy this by reasserting Congress' intent in this matter. Whether through this "sense of the Congress" approach or some other, it is imperative that Advocacy understand and carry out its full responsibilities under the RFA.

Mr. GEKAS. And we will return to Mr. Thayer and Mr. Stehlin, after we hear from Mr. Stadelman.

STATEMENT OF RICK STADELMAN, EXECUTIVE DIRECTOR,  
WISCONSIN TOWNS ASSOCIATION

Mr. STADELMAN. Thank you, Mr. Chairman.

Mr. Chairman, distinguished committee members, thank you for the opportunity to testify on the need of judicial review of the Regulatory Flexibility Act of 1980.

My name is Rick Stadelman, I am the executive director of Wisconsin Towns Association, I am testifying on behalf of the 1,266 towns in Wisconsin.

In Wisconsin, towns are the unincorporated areas possibly referred to in other States as townships. Ninety-seven percent of our towns in Wisconsin have less than 5,000 in population.

I am also testifying on behalf of the National Association of Towns and Townships of which we are a member.

I have submitted a written statement, but I would ask privilege of giving a summary of some of those remarks.

We appreciate the subcommittee's interest in hearing from small local governments on the issue of judicial review. We want to thank Congressman Ewing and Congressman Skelton for taking the leadership on this issue.



Many in Congress and Federal agencies tend to think that the Regulatory Flexibility Act as applying only to small business. NATaT, the National Association of Towns and Townships, on the other hand, has always considered Reg Flex as a potential tool to reduce the burden of unfunded mandates on local government. I say potential tool, because the Reg Flex Act suffers the fatal flaw of being unenforceable.

In our estimation, the only way to give the Regulatory Flexibility Act the teeth it needs to be effective, is to allow aggrieved parties standing to take the Federal agency to court for the failure to comply with it.

The Regulatory Flexibility Act defines small entities to include local governments with a population of less than 50,000. The National Association of Towns and Townships represents approximately 13,000 of the Nation's 39,000 general-purpose units of local government. Most of our members' local governments are small and rural.

Mr. Chairman, I think it is important to stress how small most local governments are. According to the 1992 Census of Governments, 85 percent of local governments have fewer than 10,000 residents, and 48 percent have fewer than 1,000 residents.

Small communities differ dramatically from the large communities. First and foremost, our elected officials are part-time officials. They have full-time jobs and only serve in a part-time capacity as local elected leaders.

Most have one or two or limited number of employees and maybe some part-time employees. These local officials and their limited staff have very limited access to information once rules are developed, let alone access to information as rules are being developed. I know of no towns, in fact, our own State association does not have a regular access to the Federal Register nor follow the proposed rules as they are coming.

We believe Regulatory Flexibility Act compliments your unfunded mandates initiative. Inflexibility of the regulation eliminates the benefits that local implementation can give to rules. It forces the cost up of local governments to use one-size-fits-all type of standards.

We believe that the 39,000 local units of government can best provide efficiency in applying and enforcing and taking up the mandates that are there, by allowing us to use the flexibility as necessary.

If the Federal Government is going to fund mandates in the future, we think the Federal Government should be able to do it at the lowest price and allow the local governments to use efficiencies in applying them.

Let me just kind of direct a basic statement to how the Regulatory Flexibility Act works for local governments. I have outlined it in my testimony, but simply put, the Regulatory Flexibility Act gives the Federal agency two options: The agency can certify that its regulation will have no significant impact on small governments. Or if significant impact is found, the agency should consider alternatives and involve small governments in the development of the regulations.

Now, we believe the act has failed because, in fact, very few agencies have found significant impact, and if they do, they have not taken the effort to give full consideration to alternatives. This is where we believe judicial review of an agency action will implement regulatory flexibility as originally intended.

To avoid the potential of litigation, we believe the agencies will have to pay more attention to the regulations up-front, as to how they will affect small governments and would restore the original intent to the act.

I would like to talk about just one type of example of an act that is being implemented in rules right now, that I think gives an example of this, and that is in relation to the Omnibus Transportation Employee Testing Act of 1991, which requires that employers of commercial drivers licenses must have an alcohol and drug testing program.

These rules were published in February 1994. They are applicable for employers of 50 or more as of January 1, 1995. The only token effort for recognition of small government was to delay 1 year, applicable requirements, until January 1, 1996, for any other employer, including local governments.

The same requirements for drug testing and alcohol testing apply regardless of the size of the employer, regardless of the size of the local government. The same requirements for reporting—and in my written testimony, I have given a summary of six pages of just the basic requirements that are required.

Again, the same standard, same requirements apply for all employers, including small units of local government. These requirements include a prehire drug and alcohol test, two separate tests; a postaccident test; and random testing of at least 50 percent of our employees for drug, and 25 percent of alcohol.

Our supervisors of the employees must have at least 1 hour of training for recognition of alcohol problems and 1 hour of training of drug abuse. Let me put this in terms of what it means to the local governments in Wisconsin, as I mentioned, most of which are under 5,000 in population. We have part-time elected officials who employ sometimes one, maybe two employees, and typically three, four other part-time employees.

We have the responsibility for snowplowing in our State. We have 21,000 miles of town roads of the 108,000 miles in the State of the Wisconsin. Now, because the commercial drivers license definition applies to vehicles over 26,000 pounds, our snowplows are required to have a commercial drivers licensed operator. That is the initial requirement in order to take the test.

Now the drug testing and alcohol testing requirements will apply. We will have to have a drug and alcohol testing program for all of our employees, including our part-time employees. For both prehire, postaccident, and also the random tests.

An example of the postaccident; we could have a part-time operator who is on a snowplow have an accident which is a reportable accident, and he has to leave the truck sitting and go have the test before he can continue to operate, regardless of whether or not the incident may be alcohol or drug related. At that point, the roads are still unplowed.

On the random testing, we have to test 50 percent of our employees for drug testing. For a town that has one employee, that means every year they are going to have to do a random test. I think the most burdensome part of this whole requirement, that bothers local officials is that we don't believe that alcohol and drug problems at the local level are what this law was intended to apply to.

The original Commercial Drivers License Act, we believe, was intended to direct attention to over-the-road truckers, long-haul type of trucking, but because of the definitions, because how the rules come down, the umbrella of this definitely covered local governments. And Reg Flex would have allowed the agencies, actually should have been forced the agencies to give flexibility to small government. Judicial review would give us that opportunity.

Now, one point about the timing; our local governments are just finding out about it. Even though it was published in February 1994, we are just starting to get the information out to these part-time officials, and the rule will be effective for all employers January 1, in this case. We would have never been aware of this up until this point now, and the time to bring action, they are not even aware of it, to be able to tell how it impacts.

The other point I just want to indicate is that we think this law was focused on small entities, including small governments. We are concerned and would believe that section 4003 need not be applicable to all governments, that the focus should be retained to small units of government.

In conclusion, I believe that judicial review under the Regulatory Flexibility Act would both better serve the Federal Government as well as small government. Let local governments have more say and more involvement in developing rules and more flexibility in complying with regulations, and the general public will be better served by all.

Thank you.

[The prepared statement of Mr. Stadelman follows:]

PREPARED STATEMENT OF RICK STADELMAN, EXECUTIVE DIRECTOR, WISCONSIN  
TOWNS ASSOCIATION

Mr. Chairman, distinguished Committee members, thank you for the opportunity to testify on the need for judicial review of the Regulatory Flexibility Act of 1980 (RFA). My name is Rick Stadelman and I am the Executive Director of the Wisconsin Towns Association. I am testifying on behalf of the 1,266 towns in Wisconsin, 97% of which have less than 5,000 population. I am a member of the Board of Directors of the National Association of Towns and Townships, of which the Wisconsin Towns Association is a member, and on whose behalf I am also testifying.

We appreciate the subcommittee's interest in hearing from small local governments on the issue of the judicial review. Many in Congress and the federal agencies tend to think of the Regulatory Flexibility Act as applying only to small businesses. NATAT, on the other hand, has always considered the RFA a potential tool to reduce the burden of unfunded mandates on local governments. I say "potential" tool because the RFA suffers the fatal flaw of being unenforceable. In our estimation, the only way to give the RFA the teeth it needs to be effective is to allow aggrieved parties standing to take a federal agency to court for failure to comply with it.

NATAT represents approximately 13,000 of the nation's 39,000 general purpose units of local government. Most of our member local governments are small and rural. Mr. Chairman, I think it is important to stress how small most local governments are. According to the 1992 Census of Governments, eighty-five percent of all local governments have fewer than 10,000 residents, and 48 percent have fewer than 1,000.

Small communities are simply not like larger urban areas. A community of 1,000 simply cannot do the same things that a community of 100,000 can. Many small



local governments have part-time elected officials, and many have part-time employees. This is especially true in many rural townships with geographically dispersed populations, where such a township would generally have fewer employees than a like-sized municipality. Because of lack of resources and staff support, small localities are functionally disenfranchised from the policy development and implementation process. They cannot effectively participate in the development of regulations, it is difficult for them to understand their responsibilities under complex federal laws, e.g. ADA, cable television regulation, and controlling storm water discharges from industrial sources, and they often don't have the ability to access what little federal assistance is available to small localities.

Getting information on proposed or final regulations to small governments is terribly difficult. The officials of these communities do not get the Federal Register, and chances are they do not have a source for it nearby. If they did, they would probably balk at the prospect of reading some of the more comprehensive regulations. Just the prospect of getting effective participation when an agency rule is proposed is daunting, given the window to provide comments and the time it takes for organizations like NATaT to digest the rule and communicate it to its membership. And when you stop to consider that NATaT must stay on top of proposed regulations from scores of federal agencies at the same time, the Cumulative effect of all of this regulatory activity simply makes it less likely that small governments will ever have enough resources to stay on top of things.

### RFA COMPLEMENTS UNFUNDED MANDATES LEGISLATION

Most people would agree that mandates are intended to achieve laudable goals—cleaning up streams, making drinking water safe, increasing access for the disabled—that citizens in this nation support. Since mandates tend to serve important, publicly agreed upon goals, it is important that they be funded and be capable of being implemented effectively and efficiently in all localities so that everyone can benefit.

The lack of program flexibility at the local level frustrates implementation of policy objectives embraced by the mandates. While mandates shift responsibility for program implementation to the local level, in flexible mandates eliminate the benefits of local implementation. The result is that localities often must pay more than is necessary to implement a mandate. Having the federal government pay for mandates without the benefit of local flexibility simply means that the federal government pays more than it needs to address a problem.

Local officials dearly want Congress to put an end to unfunded mandates. It is our belief, though, that passing legislation making it difficult for Congress to pass along unfunded mandates to states and localities is only a part of the remedy—albeit a very substantial part—for small communities that are trying to regain control of their local priority setting process. It is important to remember that passage of H.R. 5/S. 1 does not guarantee that there will not be future unfunded mandates. All that is required is a majority of members voting to go on record as favoring passage of an unfunded mandate. While that may be less likely in today's political climate, it may not be ten years further down the road.

It is equally important to consider exactly what costs the federal government will pick up if it agrees to pay for a mandate. To use one plausible example, say the federal government wants all localities to meet certain water quality standards for discharges, specifies the type of technology to treat water to that standard and agrees to give localities construction money to pay for the technology and treatment facility. Who pays the operating and maintenance costs for the next 30 years, which could exceed the initial investment? Perhaps a small locality should have the alternative of employing a water treatment method that could treat water to similar degree of cleanliness but which requires less O&M in future years.

Even a fully funded one-size-fits-all mandate still sends the wrong message to local elected officials. Local officials are taxpayers as well as tax collectors, and they do not want to see the federal government spending inordinate sums on a one-size-fits-all funded mandate where a policy goal could be accomplished with a less rigid approach and with less funds. Applying an inflexible policy to all 39,000 local governments will obviously result in substantial inefficiencies and cost the federal government more than is necessary.

### HOW THE RFA COULD WORK FOR SMALL COMMUNITIES

The RFA requires all federal agencies: (1) to analyze fully the effects of their regulations on "small entities," (2) to explore alternative compliance mechanisms, and (3) to involve these entities actively in the development and review of the regulations. The act defines a small entity as a small governmental jurisdiction with a



population of less than 50,000, such as cities, counties, towns, townships and villages, as well as school districts and special districts. A small entity may also be a small business or a small non-profit organization.

The law seeks to ensure that federal agencies will develop effective and efficient regulations that do not place an unnecessary burden on the public. Alternative regulatory approaches are to be considered and, as appropriate, made available to small local governments. In addition, regulations are to be developed with sufficient opportunities for input from small entities. These are great objectives. Unfortunately, in practice, local governments over the past 14 years have been denied the benefits of the RFA.

The act gives a federal agency issuing a regulation two options. It can certify that its regulation will have no significant impact on small governments. Or, if it determines that there is an impact, it must conduct a regulatory flexibility analysis. Any such analysis, which must be published in the *Federal Register* in conjunction with the proposed regulations, must discuss the impact upon small governments, including the projected reporting, record-keeping and compliance requirements. It must also include a list of significant alternatives which would accomplish the stated objectives and minimize the economic impact of the regulations upon small governments.

Significant alternatives may include, but are not limited to, establishing different compliance or reporting requirements for small entities; using performance rather than design standards; or allowing exemptions to the rule for small entities.

#### HOW THE RFA FAILS IN PRACTICE

Instead of going through the analysis required for assessing the opportunity for regulatory flexibility, most agencies simply issue the certification stating that their rule will have no significant impact on small governments. In this way they can avoid examining alternative means of compliance for small governments. Issuing the certification implies that the agency has conducted some analysis as to what the impact of the regulation will be on small governments, but in reality, *the certification is almost always issued without the agency ever conducting an evaluation where there will be an impact.*

Unfortunately, this is able to take place because the act suffers from a lack of teeth to force agencies to comply with the law's intent. To correct this problem, Congress should mend the Regulatory Flexibility Act itself to subject agency compliance with the act to judicial review. Individuals aggrieved by an agency's failure to comply with the act would be empowered to challenge the agency's actions in court. In other words, an agency's certification that its regulations had no impact on small governments would be subject to possible judicial challenge. Or, if an agency agrees that its regulations will significantly affect small communities but doesn't consider alternative approaches, the agency could be challenged in court. To avoid potential litigation, agencies would have to pay much more attention to how their regulations affect small governments, meaning that we would be restoring the original intent of Congress in passing the Regulatory Flexibility Act in the first place.

Let me give you a couple of good examples of how an operable RFA process can help small communities.

The Americans with Disabilities Act is, most would agree, good legislation. It empowers those in our communities that are disabled, giving them the right to participate fully in public programs, prohibits public employment discrimination and provides greater access to facilities. As legislation, it was crafted with great flexibility, requiring that a public employer provide reasonable accommodation to persons with disabilities and allowing exemptions to its provisions because accommodation would create an undue financial hardship for the local government. In short, the law strikes a balance between the reasonable accommodation of citizens' needs and the capacity of local government to respond.

However, when the law was put into the hands to the federal agencies charged with drafting the ADA, something went amiss. The Department of Justice, in its proposed regulations for bringing state and local government programs into compliance, determined that the proposed regulations would not have a significant impact on a substantial number of small business entities and, therefore, the rules were not subject to the Regulatory Flexibility Act. That was obvious to us since the regulations dealt only with state and local government programs. However, since the Department of Justice was silent on the impact on small local governments and did not certify that there would not be a significant economic impact, it was required by law to conduct a regulatory flexibility analysis.

The Department of Justice did conduct a Regulatory Impact Analysis under the old Executive Order 12291. That analysis concluded that the ADA extended pro-

gram accessibility standards of the Rehabilitation Act of 1973 "to the last remaining portion of the public sector not yet covered by those standards." It went on to note that "Virtually all of the public sector . . . is already subject to the Rehabilitation Act on account of receipt of federal funding." That erroneous assumption led to the conclusion that the impact of ADA on state and local governments would be minimal because most were already in compliance because of receipt of federal funds and the other would be able to exempt themselves with significant compliance measure because of "undue hardship" grounds. Interpreters were thought to be the primary program accessibility cost.

In short, there was no preliminary regulatory flexibility analysis; no significant alternatives were identified which would accomplish the intent of the legislation while minimizing costs; and no public comment was invited because the Regulatory Impact Analysis was not published in the Federal Register, as a regulatory flexibility analysis, or its summary, is required to be.

In the absence of a discussion of significant alternatives for small entities, the federal agencies implementing the ADA regulations could have provided some guidance on the fundamental concepts on which compliance is judged. Such an action would prevent unnecessary legal expenses to resolve in court what should have been defined by the agencies charged with issuing the regulations. For example, if an "undue financial hardship" were defined broadly as a project where accessibility requirements added more than some percentage of total project costs. The thresholds which trigger consideration for "undue burden" and "undue hardships" should have been better articulated. I am including with my testimony correspondence between NATaT and the Department of Justice and between NATaT and the Architectural and Transportation Barriers Compliance Board which is illustrative of agency reluctance to substantively comply with the RFA.

Another example is drug and alcohol testing of drivers with commercial drivers licenses. I am also submitting with my testimony an outline of the regulations for drug and alcohol testing of transportation workers which I provide to my Wisconsin towns. While the testing requirements might make sense for a metropolitan transit authority, I cannot really imagine all these rules being necessary or applicable to a small township that has three full-time employees that grade roads and operate snow plows and a couple of other parttime people that are pressed into service on a very part-time basis as relief snow plow drivers during major storms. Yet the small township, which probably has a total budget that is a small fraction of the metropolitan transit authority, must still follow the same rules. So, it is obviously important that federal agencies consistently issue realistic regulations for small local governments.

Judicial review is, as far as we have been able to ascertain, the only means of ensuring compliance with the Regulatory Flexibility Act. Any other fix that we have been able to think of—presidential persuasion, investing the Office of Management and Budget with greater authority, an executive order—is only a temporary fix. For local governments in particular, judicial review is vital. The Regulatory Flexibility Act charges the Small Business Administration (SBA) with oversight responsibility for agency compliance with the RFA. The problem is that the SBA is a small business agency, not a local government agency. It has great data on small businesses, but not local governments. Additionally, being an advocate for small businesses places the SBA on opposite sides of local governments on some regulations. Take, for instance, the voluminous regulations on regulating basic cable rates. Can the SBA be an advocate for small cable operators and small local governments at the same time? Alternative policies for small communities need to be considered and proposed by federal agencies during the rulemaking process. The way to make them consistently consider small local government concerns is through the threat of being sued.

The major concern, at least the concern that we hear most often, is that judicial review of this act will "clog the courts." Critics of judicial review are willing to continue allowing federal agencies to promulgate regulations in a one-size-fits-all pattern on small local governments and small businesses because they believe that judicial review will burden the courts. What about the burden on local governments and business, which a town meeting in the district of any member of Congress will confirm as being a real and costly problem? The courts are really a red herring in this matter. The real issue is a vast federal bureaucracy that is unwilling to meet its responsibility under the RFA.

In conclusion, small communities are ill-served by the current regulatory process. It is difficult for them to play a significant part in the rule development process and make their concerns known. Many times they are told how they must do things when there are cheaper ways to go about it, for example by the use of performance-based standards rather than technology-based standards. Often, the recordkeeping

and reporting requirements are onerous and ill-suited to local governments with part-time employees. We urge this subcommittee and this Congress to strengthen the RFA by allowing judicial review, and thereby empowering small local governments and businesses.



National  
Association of  
Towns and Townships

March 29, 1993

Elizabeth A. Stewart  
Office of the General Counsel  
United States Architectural and Transportation  
Barriers Compliance Board  
1331 F Street, NW  
Washington, DC 20004-1111

Dear Ms. Stewart:

The National Association of Towns and Townships (NATaT) is writing to respond to the proposed rulemaking by the Architectural and Transportation Barriers Compliance Board regarding the Americans with Disabilities Act Accessibility Guidelines; State and Local Government Facilities.

#### NATaT Strongly Supports the ADA

Over the past two years, NATaT has provided unique leadership in promoting acceptance, understanding and active compliance with the ADA by small and rural governments. NATaT has sold over 9,000 copies of *The Americans With Disabilities Act: a compliance workbook for small communities* to individual local governments as well as bulk orders to such groups as the Equal Employment Opportunity Commission (EEOC), the National Organization on Disabilities, numerous state township associations, the South Carolina Municipal Association and others.

The basic premise of the workbook (written with the close cooperation of the Department of Justice [DOJ] and the EEOC) is that the ADA allows considerable flexibility for small governments with limited resources to open up their services, facilities and employment opportunities to citizens with disabilities. Without compromising the admirable purpose of the ADA, the "undue hardship" and "undue burden" provisions within the ADA regulations are designed to protect small governments from unlimited compliance costs by insuring that they can and should consider low-cost and no-cost compliance alternatives. In the area of employment, the EEOC's *Technical Assistance Manual for the Americans With Disabilities Act* states in Chapter III, section 8.4, "... the employer is free to choose among effective accommodations, and may choose one that is less expensive or easier to provide." In the title III regulations dealing with major structural



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renovations, DOJ even provides a specific standard (i.e. in excess of 20 percent) to determine when the cost of providing an accessible path of travel will be deemed disproportionate to the overall cost of alterations to the primary function area.

This essential fairness, which lies at the heart of the ADA legislation, is threatened if non-negotiable regulations are allowed to replace local flexibility and choice. The proposed ADAAG rules for state and local governments violate, in NATaT's opinion, the spirit of the ADA in three major areas: they examine peripheral rather than critical cost areas; they mandate such costly structural items as elevators for all new public buildings or for major renovations above the ground floor without providing any guidelines as to if or when an "undue hardship" could be justified on the basis of the percentage of total project cost or the limited resources available; and they turn the responsibility for documenting economic impact and the need for low-cost alternatives back to the regulated community rather than providing such information as required in various impact analyses.

### Regulatory Flexibility Act Largely Ignored

NATaT would like to offer some background on the proposed ADAAG rules for state and local governments, because the arbitrary nature of the issues chosen for the preliminary impact analysis has its roots in the same flawed process conducted for the final 1991 ADAAG regulations, implementing Subtitle A of title II of the ADA.

In 1980, ten years before passing the ADA, Congress recognized the necessity of balancing the demands of unfunded mandates with the limits of small town and small business resources when it enacted the Regulatory Flexibility Act (RFA). But NATaT believes that local governments have been denied much of the discretion that the Regulatory Flexibility Act should provide for ADA compliance because the required RFA analysis, describing, "... significant alternatives to the rule.... designed to minimize any significant impact of the rule on small entities...." simply has not been conducted.

While the Regulatory Flexibility Act is acknowledged in both the initial ADAAG regulations of 1991 and again in the proposed rules for State and Local Government Facilities published December 21, 1992, the full scope of the RFA requirements are largely ignored. The proposed ADAAG rules state correctly that the RFA allows its required regulatory flexibility analysis to be conducted "in conjunction with or as part of any other agenda or analysis required by any other law..."

The RFA, however, does not allow for other such mechanisms either to replace, or to ignore altogether, the specific economic impact analysis of affordable alternatives for small entities. Yet both the final 1991 requirements and the proposed ADAAG rules substitute a regulatory impact analysis, allowed under Executive Order 12291, for the full



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impact analysis on small entities required by the RFA. Both sets of ADAAG regulations maintain that the "reg flex" requirements have been met. In fact, they have not. Let me cite a few illustrations.

On page 4, the December 18, 1991 Justice Department Final Regulatory Impact Analysis for the title II regulations states: ".... it seems relatively clear that its [Subtitle A of title II] overall economic impacts are likely to be quite minor.... Virtually all of the public sector-- as measured by size-related criteria such as size of capital stock or number of employees--is already subject to the Rehabilitation Act on account of receipt of Federal funding."

Throughout the remainder of the analysis, there are statements that contradict this far-reaching assertion. The first sentence on page 27, says, "The remaining major cost items imposed by Subtitle A of title II [referring to costs for court-related interpreters discussed on page 26] will be the cost of providing program accessibility to the "town hall" operations of those governmental bodies that do not now handle Federal funding and the costs incurred by newly-covered special purpose governmental bodies."

On the same page, the analysis concludes that the number of public entities not receiving federal funding is "20,000 or so," a remarkable reversal from the ".... virtually all of the public sector...." so confidently cited on page 4. And from NATaT's perspective, these "town hall" operations are the very same small public entities which the full regulatory impact analysis is meant to benefit and protect.

#### No Guidance on "Undue Burden"

In this same section, there is a reference to "undue burden" which has vast implications for small and rural governments, but no guidance as to its application. The sentence reads, "Out of the 83,250 existing governmental bodies, perhaps three-quarters either receive Federal funding for or through their central administrative branch, or will be exempt themselves from significant compliance costs on 'undue burden' grounds." Offered as it is without explanation, the sentence raises a number of questions:

- does the sentence suggest, erroneously, that a local government either receives federal funding or "will be exempt?"
- does the phrase, "will be exempt themselves" imply that the determination of "undue burden" is made by an outside authority or agency, and that once made, this judgement protects the entity from "significant compliance measures" regardless of their nature?

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- what are the factors for determining "undue burden?" Is this determination based on the collective costs of all program accessibility expenditures, or is each facility and/or program judged individually, regardless of the total impact on the community's available resources?

This is a dangerously open-ended statement. Local governments are looking for guidance on acceptable and affordable ADA strategies, not loop-holes for non-compliance. In ignoring the RFA, by not providing alternatives and by not providing some guidance as to the allocation of scarce resources to where they will do the most good, the DOJ is actually hindering ADA implementation and dampening the enthusiasm with which most small town officials have greeted the opportunity to open up programs, services and employment to citizens with disabilities.

This failure to address essential small town issues continues in the December 16, 1992 PRIA for proposed state and local government facilities. The PRIA states on page 5 that "the new provisions addressed here pertain to buildings and facility types unique to public entities that are owned and operated by State and local governments covered by title II of the ADA.

The four proposed sections deal with:

- Section 11. Judicial, Legislative and Regulatory Facilities
- Section 12. Detention and Correctional Facilities
- Section 13. Accessible Residential Housing
- Section 14. Public Rights-of-Way

With the exception of rural counties, the vast majority of small and rural governments do not own or operate courtroom, regulatory or correctional facilities. Generally, they are not involved with the administration of public housing. If there is a downtown or main street area or a closely-settled residential area, then small towns do construct and maintain sidewalks, traffic signals and indicators. This single section, to its credit, is clear, appropriate and reasonable.

In its discussion of the applicability of the Regulatory Flexibility Act, the proposed rule states that a preliminary analysis must be conducted for small communities since, "These guidelines will have such [a substantial economic] impact." While offering nearly 200 pages of detailed analyses of "facility types" which are largely irrelevant to small and rural governments, the PRIA offers no cost impact data, alternatives or guidelines for such key areas as alterations, exempt spaces and structures, accessible entrances and automatic door openers which are treated together under General Issues. Each of these issues must be considered in calculating costs for virtually all new construction or renovation to virtually all local government buildings. NATAT believes that this information simply must be gathered and

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weighed heavily by the Access Board before the final regulations are issued. And this analysis should be developed not only to guide the Board's decisions, but to assist small and rural governments in understanding the alternative ADA compliance strategies available to them and the broad definitions "undue burden", "undue hardship" and "reasonable accommodation."

In NATaT's opinion, these definitions are critical to protect small towns from economic exploitation and from regulation by law suit. A whole new breed of ADA "entrepreneurs" has grown up, armed with scare tactics, high-priced copies of free government materials and construction plans based on total access to every public facility. Unwary local governments will continue to waste scarce public dollars on what they are told "the ADA requires," unless some broad, federally-endorsed guidelines are available to help small town leaders to judge the difference between reasonable accommodations and profiteering.

Similarly, many small town leaders say that their first indication that the community may be out of compliance with the ADA comes in the form of either a law suit or a complaint filed with a federal agency. Once more, definitions of the fundamental concepts on which compliance is judged would prevent a great deal of unnecessary legal expenses to simply hammer out in court what should be defined by the agencies charged with regulation. Further, such definitions would provide the broad parameters for negotiation and alternative dispute resolution, replacing the reliance on litigation now sought to fill this information void.

The philosophy of "regulatory flexibility" exists within ADA itself through the availability of exemptions based on undue burden or undue hardship. But without definitions based on such accessible information as annual general revenues and percentage of total project costs, local government will continue to spend dollars unnecessarily on facility improvements and legal fees.

#### Faulty, Undocumented Standards

In reading and re-reading the final and proposed ADAAG rules and their accompanying analyses, one wonders how the needs of small towns could be so systematically ignored or understated. Is there an assumption that simply will not hold up to even the least demanding logic? It is there, we believe, buried in the discussion of Regulatory Process Matters on page 60,650 of the December 21, 1992 *Federal Register*. It reads, "Several studies discussed in the Regulatory Impact Analysis prepared for the initial rulemaking have shown that designing buildings and facilities to be accessible, from the conceptual phase onward, adds less than one percent to the total construction costs." Who can argue with a statistic like that when the benefits of such

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accessibility are widely recognized and supported by the governments affected?

But where did these studies come from and what do they conclude about smaller governments? Let's go to the source cited in the proposed rules. The Final Regulatory Impact Analysis for Subtitle A of title II of the ADA states, on page 20, that "a number of studies have offered estimates regarding the likely cost increase of making new construction accessible. Those studies have reached varying conclusions regarding the likely cost increase that range from 0.1 % to 1.0 % of total construction costs, exclusive of land." That's it. No citations. No details. No breakout for small communities.

How does this one percent solution play out, using only the figures contained in the analysis itself? Earlier, on page 18, dollar estimates for the year 1990 are offered for installation of a ramp covering a seven step rise (\$17,000) and installing an accessible water fountain (\$1,700). By adding these two figures together and multiplying by 100, we find that this building would have cost close to \$2,000,000 in order to conform to the estimated one percent increase. If we then calculate the cost for an elevator (required under sections 4.1.3.(5) and 4.1.6.(1)(k) of the proposed rules) and the cost for an automatic outside entrance door opener (proposed under the discussion of "General Issues"), the building easily tops \$10,000,000 in order to maintain the one percent upper limit documented by "a number of studies." The lower limit of a one tenth of one percent increase in construction costs yields figures that no small town in the country ever has or will spend on a public facility.

### The Real World of Small Town America

Moving from numbers in studies to numbers that bear on ADA compliance in the real world:

- half of all local governments in the country (about 19,000) are less than 1,000 in population
- according to the Bureau of the Census, the 1986 average annual revenues for localities under 1,000 was around \$200,000
- with these limited resources, localities must provide all local services, maintain public health and safety and meet dozens of other unfunded federal and state mandates which often carry heavy penalties for non-compliance

There is a real world out there in which local governments respond with good will to reasonable regulations and meaningful guidance. There are persons on township boards with disabilities who are planning to finance accessible rest rooms before the January 1995 deadline for structural changes. They would be outraged if forced to spend scarce resources on accessible life guard stands, fire towers and



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the like. Can't there be some clear, reasonable benchmarks which serve the interests of local government, members of the disability community and the agencies charged with compliance? And shouldn't the Department of Justice and the Compliance Board be taking the lead in proposing and promoting rules based on negotiation, compromise and alternative resolution processes, rather than issuing regulations that elicit from NATaT, one of ADA's principal champions, a response that appears to place us in an adversarial position?

In conclusion, NATaT strongly urges the Access Board take the following steps before issuing the final ADAAG rules for state and local government facilities:

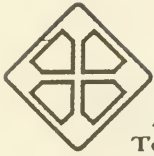
- conduct the full economic impact analysis on small entities as required by the RFA, even if it is included in a final Regulatory Impact Analysis
- examine the categories listed earlier (elevators, entrances, etc.) that have broad-ranging application to all local government facilities
- articulate clearly the relationship between the alternatives identified and encouraged by the reg flex analysis and the thresholds which trigger consideration for undue burden and undue hardship exemptions
- describe these definitions, relationships and threshold criteria in the clearest of terms, yet incorporate maximum latitude for local flexibility and negotiation in reaching compliance agreements

NATaT staff would be happy to confer with the Access Board on any of the issues raised in this response. Thank you for your consideration of these comments that reflect the concerns of thousands of local governments and millions of Americans.

Sincerely,

  
Jeffrey H. Schiff  
Executive Director

Regina Montoya, Office of Intergovernmental Affairs, The White House;  
Barney Singer, U.S. Small Business Administration



**National  
Association of  
Towns and Townships**

March 4, 1992

Mr. John Wodatch, Director  
Office of ADA  
Department of Justice  
P.O. Box 66738  
Washington, D.C. 20035-6118

Dear Mr. Wodatch:

On behalf of the National Association of Towns and Townships (NATaT), I am writing to offer comments on the Department of Justice's analysis of the impact of the Americans with Disabilities Act (ADA) on small local governments.

NATaT represents approximately 13,000 mostly small, mostly rural local governments. In a sense, NATaT represents the typical local government, since the vast majority (78 percent) of the 39,000 general purpose units of local government in the United States have fewer than 5,000 residents.

Let me begin by stating, emphatically, that NATaT supports the goals of the ADA. We are currently developing technical assistance materials for use by small local governments so that they will be able to implement the ADA regulations to the letter of the law. We also have a history of working with small governments so that they could comply with Section 504 requirements during the days of the General Revenue Sharing program.

**RegFlex Law Not Followed**

NATaT has several concerns with the Department of Justice's (DoJ) evaluation of the impact of the ADA on local governments. First, the supplementary information accompanying the proposed ADA Title II regulations states that the Department determined that the proposed rules will not have a significant economic impact on a substantial number of small business entities, and therefore are not subject to the Regulatory Flexibility Act.

It is certainly true that the proposed rules have no significant impact on small business entities because the rules pertain to state and local government service. Nevertheless, the proposed rules have a most significant impact on small local governments, which are also defined

Mr. John Wodatch  
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as small entities under the Regulatory Flexibility Act. Since the DoJ is silent on the impact of the rules on small local governments and did not exempt itself from the requirements of the RegFlex Act, it should have conducted a regulatory flexibility analysis for small local governments.

Secondly, the supplementary information to the proposed regulations goes on to reveal that the Department did prepare a preliminary Regulatory Impact Analysis (RIA) pursuant to Executive Order 12291. However, the supplementary information accompanying the final Title II regulations curiously observes that the preliminary RIA contained "all the available information that would have been included in a preliminary regulatory flexibility analysis, had one been prepared under the Regulatory Flexibility Act, concerning the rule's impact on small entities" and that "[t]he final RIA will contain all of the information that is required in a final regulatory flexibility analysis and will serve as such an analysis."

These comments certainly seem to indicate that the Department believes that it now has the obligation to conduct a regulatory flexibility analysis, since DoJ would have the final RIA serve as a regulatory flexibility analysis. Putting aside the point that an RIA is not a regulatory flexibility analysis, what does the Department's RIA say of the impact of Title II on small local governments? Since the final RIA was not made available at the time the final Title II regulations were published, and has yet to be released, one must go to the preliminary RIA for guidance.

#### **RIA Assumptions Are Unfounded**

That document notes that "there is considerable uncertainty regarding the precise impact of the Title II regulations..." It goes on to state that Title II extends the program accessibility standards of the Rehabilitation Act of 1973 " ... to the last small remaining portion of the public sector not yet covered by those standards. Virtually all of the public sector ... is already subject to the Rehabilitation Act on account of receipt of Federal funding." That assumption led the authors of the RIA to believe that the reach of the regulations seems to be limited to state and local court systems not receiving federal aid " ... and to the central 'town hall' operations of those local and special purpose governmental entities that do not receive Federal aid for administrative and other purposes."

The fact of the matter is that since the end of the General Revenue Sharing program in 1986, the vast majority of the 39,000 general purpose units of local governments in the United States -- we estimate 80 percent -- do not receive federal funds, for administrative or any

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other purpose. Therefore, they have not been subject to the provisions of Section 504 for quite some time and have had no financial incentive to make their programs and services accessible for disabled persons since that time.

It follows, then, that the impact of Title II on the majority of local governments -- and virtually all small local governments -- is quite significant. All programs must be accessible, physical facilities must be accessible, local governments may have to incur higher costs to construct new buildings or rehabilitate old ones in order to meet certain access requirements, emergency numbers must have TDD access and so forth. To say that there is no significant impact on small local governments simply flies in the face of the facts.

The Department, by not conducting a preliminary regulatory flexibility analysis, disingenuously avoids the key requirements of the Regulatory Flexibility Act. Accompanying the proposed rules should be a preliminary regulatory flexibility analysis, which includes a list of significant alternatives which would accomplish the stated objectives of the ADA and minimize the economic impact of the regulations upon small entities. A preliminary regulatory flexibility analysis was not published in the *Federal Register* along with the proposed rules.

No one could have known that the preliminary RIA was to serve as a preliminary regulatory flexibility analysis, since that wasn't stated until the final regulations were issued six months later. And in any case, the preliminary RIA was not published in the *Federal Register* for public scrutiny and comment. The public was required to request it from the Department, and even then, the preliminary RIA contains virtually none of the most important information of a preliminary regulatory flexibility analysis, especially proposed alternatives for small entities that accomplish the goals of the ADA while taking into consideration the limited resources of small entities. This is a key difference between an RIA and a regulatory flexibility analysis.

#### **Public Was Denied the Chance to Participate**

The final regulatory flexibility analysis which accompanies the final regulations should, by statute, include public comments in response to the preliminary analysis, as well as changes made in response to those comments. Most importantly, the final analysis should include a description of each of the significant alternatives to the rule which was considered by the agency, and the reason(s) why each was either accepted or rejected.

By neither performing a preliminary regulatory flexibility analysis nor availing itself of the exemption for small governmental entities, and



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implying the need for one upon issuing the final regulations, the Department subverted the regulatory flexibility analysis process. Alternatives weren't proposed -- an obligation placed on the federal government by the Regulatory Flexibility Act -- so there was never a question of small entities being allowed to implement the regulations flexibly.

Groups such as NATaT certainly would have challenged an assertion of no impact on small local governments and, if a RegFlex analysis had been performed, would have participated vigorously in the examination of proposed alternatives. Unfortunately, we were not permitted either of these opportunities specified in the RegFlex law.

The sole flexibility that the regulations give small communities is that they must "reasonably accommodate" a disabled person unless it causes "undue hardship." Unfortunately, those terms are not well-defined and can only be clarified on a case-by-case basis. Small communities are essentially being told by the federal government: "Comply with the law. We won't tell you how, but we will tell you if you do it wrong."

Such an approach can only result in communities complying by investing more than is necessary, in the face of uncertainty, to avoid legal challenges, or by communities learning the hard way through costly lawsuits. Either alternative seems inefficient, uneconomical and unnecessary. This approach is also inequitable for local governments.

For example, two local governments in different states are found to be out of compliance with ADA under the exact same circumstances and must make physical modifications to their town hall. The courts could compel each jurisdiction to make very different modifications, thereby incurring very different costs. Until there is a wealth of case history, there will be no agreed-upon common approach to resolving such an issue. The same holds true for the employment provisions of the ADA that apply to local governments: what might be a reasonable accommodation or an undue hardship for one local government could be judged the complete opposite elsewhere.

With virtually all small governments responsible for constructing new facilities or rehabilitating existing ones according to set standards, ensuring that their programs -- including new programs mandated by federal and state authorities since the end of General Revenue Sharing -- are accessible to the disabled, and installing TDD or similar equipment to ensure that the hearing impaired can access emergency numbers, it is difficult to believe that the cost of interpreters is going to be the primary program accessibility cost for local governments, as the Department stated in its preliminary RIA.

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**RegFlex Strongly Supported by President Bush**

Given the Department's assumption that virtually all public entities were already covered by Section 504 of the Rehabilitation Act (which they are clearly not) it is incumbent upon the Department of Justice to re-evaluate its conclusions about the impact of the Title II regulations on small local governments. We would certainly expect this to be the case for two reasons. First, this is an enormous and all-encompassing piece of legislation, directed specifically at local governments. Secondly, at our annual conference this past year, our keynote speaker, President Bush, told our membership that he would instruct all federal departments and agencies to implement the Regulatory Flexibility Act to the full extent of its spirit and intent.

Again, let me reiterate that we support the ADA fully. We are not seeking exemptions for small local governments. We are asking the Department to properly consider the ADA regulations in light of the Regulatory Flexibility Act, specifically the act's requirements that alternative, flexible approaches be proposed and considered that will allow small entities to meet the ADA's requirements. NATaT staff would be glad to offer the Department any assistance we can regarding the impact of Title II on local governments.

Sincerely,

  
Jeffrey H. Schiff  
Executive Director

cc: The Honorable William P. Barr, Attorney General of the United States

Debra Anderson, Deputy Assistant to the President for  
Intergovernmental Affairs



## Drug Test Management

AS AN EMPLOYER, WHAT MUST YOU DO TO COMPLY WITH THE NEW 49 CFR PART 382 OF THE OMNIBUS TRANSPORTATION EMPLOYEE TESTING ACT OF 1991 AS IT APPLIES TO DRUG AND ALCOHOL TESTING??

### IMPORTANT ABBREVIATIONS USED IN THIS REGULATION

- DOT - Department of Transportation
- OST - Office of the Secretary of Transportation
- FHWA - Federal Highway Administration
- NHTSA - National Highway Transportation Safety Administration
- CPL - Conforming Products List of the NTSB
- DRE - Drug Recognition Expert
- MRO - Medical Review Officer
- EBT - Evidentiary Breath Testing device
- BAT - Breath Alcohol Technician
- SAP - Substance Abuse Professional

### REQUIREMENTS OF THE RULE

1. The rule requires that your covered employees be tested for five specific types of drugs as well as alcohol and sets the times, terms and conditions for this testing.
2. What is a covered employee?
  - a. ANYONE who must have a Commercial Drivers License to perform their job duties, and that performance concerns a safety-sensitive function.
3. What is a safety-sensitive function?
  - a. Anyone driving, ready to drive, or being immediately available to drive as an employment responsibility.
4. What drugs are tested for under the rule?
  - Marijuana (THC)
  - Cocaine
  - Opiates
  - Phencyclidine (PCP)
  - Amphetamines (including methamphetamines)
  - And alcohol
5. When must these tests be done?
  - a. Pre-Employment
    - (i) Before hiring an applicant and placing that person in a safety-sensitive position

- b. Random (20% of covered employees for drugs, 20% for alcohol per calendar year)
  - (i) These must be true random tests, i.e., each employee has an equal chance of being tested each time numbers (names) are generated
  - (ii) For alcohol, these tests must be conducted just prior to, during, or immediately following performance of a safety-sensitive function
- c. Post-accident:
  - (i) If an alcohol test is not administered within TWO HOURS following the accident, you must prepare a report and maintain on record a file stating the reasons the test was not promptly administered. If a test is not administered within 8 hours, you must cease attempts to administer an alcohol test and prepare and maintain the same record as for the 2 hour requirement. You must test within 32 hours for drugs.
- d. Return-to-duty
  - (i) After completing any program recommended by a Substance Abuse Professional prior to returning to work in a safety sensitive position
- e. Follow-up
  - (i) At least 6 times in the next twelve months following return-to-duty; under certain conditions may be as many as 30 times in 60 months

6. Can I do this testing in house?

- a. Regulations require that the drug testing be analyzed by a laboratory approved by The Substance Abuse and Mental Health Services Administration, HHS (formerly NIDA), consequently you must contract with an approved lab
  - (i) You can, however, set up collection points, with trained personnel, and follow the proper procedures as regards proper collection, chain of custody matters, etc.
- b. Alcohol testing can be done in house. Your supervisors can be trained to administer these tests. There is a requirement that the only breath testing machines that can be used must appear on the Conforming Products List (CPL) of the National Highway Transportation Safety Administration (NHTSA).

7. What types of training must I provide?

- a. Supervisors must receive 60 minutes of training in the recognition and signs of drug abuse and alcohol misuse. That is, 60 minutes of training in each of those subjects (total of two hours) on how to perform their duties as they relate to the rule and how it affects covered employees.
- b. Covered employees must be provided with certain information, which the Department of Transportation and the Federal Highway Administration (DOT & FHWA) have specifically identified. There are 11 required types of information that must be presented to these employees. Each and every covered employee must be given this material and must sign a form that they have, in fact, received this material. The material is extensive, and quite detailed in what must be provided.
- c. Employers will ensure that each covered employee receives this material



- (i) The identity of the person designated to answer employee questions about the materials.
- (ii) The categories of employees subject to this part of the regulation
- (iii) Enough information about safety-sensitive functions performed by the employee to make clear what part of the work day the employee must be in compliance with the rule
- (iv) Specific information to inform the employee what conduct this regulation prohibits
- (v) The circumstances under which an employee will be tested for drugs and/or alcohol
- (vi) Explain the procedures used to test for alcohol and drugs, to protect employee privacy and the integrity of the testing process, safeguard the validity of the test results and see that the results are attributed to the right employee
- (vii) The requirement that the employee submit to drug and alcohol tests
- (viii) An explanation of what constitutes a refusal and the consequences
- (ix) The consequences for employees who have been found to have violated subpart B including requirements for removal from duty
- (x) Consequences for covered employees having concentrations of .02 but less than .04 in a breath alcohol test
- (xi) Information regarding the effects of alcohol and drugs on one's health, work, and personal life; signs and symptoms of an alcohol or drug problem (the employees or a co-workers); and available methods of intervention including confrontation and intervention.

8. What happens when a covered employee tests positive for either drugs or alcohol?

a. You as the employer or through your supervisors must take certain action following positive results of alcohol or drug tests.

- (i) Breath alcohol tests results of .02 to .039
  - (a) Confirmation testing after a wait of 15 minutes
- (ii) Confirmation test, then consequences
  - (a) If .02 to .039 employee must be removed from safety-sensitive position for minimum of 24 hours
- (iii) Breath alcohol test results showing .04 or greater
  - (a) Wait minimum of 15 minutes, followed by confirmation test
- (iv) Confirmation test, then consequences
  - (a) If .04 or higher, employee must be removed from safety-sensitive position and referred to a SAP (Substance Abuse Professional)
- (v) Drug tests determined positive by Medical Review Officer
  - (a) Consequences - Must be referred to a SAP

9. Can't local law enforcement personnel do this testing?

a. If the law enforcement individual is a trained Breath Alcohol Technician (BAT) under contract to you and the breath machine which is used is on the CPL (Certified Products List), however, keep in mind that in case of a reasonable suspicion test how readily available is your contracted tester? You must test within two hours, and you would not want a person driving if you suspected misuse of alcohol.

10. What records am I, as the employer, required to keep and for how long?

- a. Five years
  - (i) Records of alcohol test results showing concentrations of .02 or more
  - (ii) Records of driver verified positive drug tests
  - (iii) Documentation of refusals to take required tests
  - (iv) Calibration documentation
  - (v) Driver evaluation and referrals
  - (vi) A copy of each annual calendar year summary
- b. Two years
  - (i) Records related to the alcohol and drug collection process and training documents
- c. One year
  - (i) Records of negative and cancelled drug tests and alcohol tests with concentrations of less than .02

11. What types of records must I keep?

- a. Related to collection process
  - (i) Records related to collection process
  - (ii) Collection logbooks, if used
  - (iii) Documents relating to random selection process
  - (iv) Documentation of BAT training
  - (v) Documents regarding decisions to require reasonable suspicion tests for drugs or alcohol
  - (vi) Documents regarding post-accident tests
  - (vii) Documents verifying existence of a medical explanation of the inability of an employee to provide adequate breath for an alcohol test or a urine sample for drug testing
  - (viii) Consolidated annual calendar year summaries as required by 382.403
- b. Related to driver's test results
  - (i) Employer's copy of alcohol test form
  - (ii) Employer's copy of drug test chain of custody and control form
  - (iii) Documents sent by MRO to employer including those required by 382.407(a)
  - (iv) Documents related to refusal by driver to submit to drug or alcohol test required by this part
  - (v) Documents presented by driver to dispute results of a drug or alcohol test required under this part
- c. Related to other violations
- d. Related to evaluations
  - (i) Records regarding a SAP's determination as to a driver's need for assistance
  - (ii) Records concerning a driver's compliance with recommendations of the SAP, i.e. related to education and training

on both

- (i) Documentation of compliance with part 382.601 including driver's signed receipt of materials
- (ii) Documentation of training of supervisors in the area of reasonable suspicion of alcohol misuse or use of controlled substances
- (iii) Documentation that any training which has been done is in compliance and meets the requirements for such training

**f. Records related to drug testing**

- (i) Must have copies of agreements with collection site facilities, laboratories, medical review officers, and consortia
- (ii) Names and positions of officials and their roles in the employer's alcohol and drug testing program
- (iii) Monthly laboratory statistical summaries of urinalysis required by 40.29(g)(6)
- (iv) The employer's drug and alcohol testing procedure

**12. How must these records be reported?**

- a. All records must be kept in prescribed form and be supplied to DOT when requested. You will be notified whether to submit your records each year.

**13. What happens if I don't keep proper records?**

- a. Penalties can be severe, for example, just an error in paperwork can mean a fine of up to \$500.00 for each violation. Other violations can run as high as \$10,000.00 per occurrence and loss of federal funding, if any

**14. Location of Records**

- a. All records required to be kept must be maintained as required and must be made available for inspection at the employer's principal place of business within two business days after a request by an authorized representative of the Federal Highway Administration

**15. What summary records are required?**

- a. You must prepare and maintain by March 15th of each year, an annual calendar year summary of the results of all drug and alcohol testing performed during the previous calendar year
- b. Each summary that contains verified positive drug test results and alcohol screening tests with concentrations of .02 or greater or any other violations of alcohol misuse must include the following elements:
  - (i) Number of drivers subject to part 382
  - (ii) Number of drivers subject to testing under the alcohol misuse or drug use rules of more than one DOT Agency - identified by each Agency
  - (iii) Number of urine specimens collected by type of test (e.g., random, reasonable suspicion, etc.)
  - (iv) Number of positives verified by MRO for type of test and type of drug
  - (v) Number of negative drug tests verified by MRO by type of test

- (vi) Number of persons denied a position as a driver following a pre-employment verified positive drug test or an alcohol test with concentration of .04 or greater
  - (vii) Number of drivers with MRO verified positive tests for multiple controlled substances
  - (viii) Number of drivers who refused to submit to an alcohol or drug test required by this regulation
  - (ix) Number of supervisors who have received required alcohol training during the reporting period
  - (x) Number of screening alcohol tests by type of test
  - (xi) Number of confirmation alcohol tests by type of test
  - (xii) Number of confirmation alcohol tests with concentration of .02 or greater but less than .04 by type of test
  - (xiii) Number of confirmation alcohol tests with a concentration of .04 or greater by type of test
  - (xiv) Number of drivers returned to duty after complying with a SAP's recommendation in this reporting period who had previously had a verified positive drug test result or engaged in prohibited alcohol misuse
  - (xv) Number of drivers who were administered drug and alcohol tests at the same time with both a verified positive drug test result and an alcohol test result with concentration greater than .04
  - (xvi) Number of drivers who were found to have violated any non-testing prohibition of Subpart B and any action taken in response to the violation
- c. Each employer's annual summary which contains only negative drug test results, alcohol screening test results of less than .02 and no other violations may prepare and submit either a

standard summary form with information as listed above or an "EZ" report form. The abbreviated "EZ" form requires the above information with some slight differences

16. Who may have access to these records?

- a. The covered employee to his/her own records
- b. The employer
- c. The Secretary of Transportation
- d. Any DOT agency
- e. Any State or local official with regulatory authority over the employee
- f. Any prospective employer with the employee's written consent



Mr. GEKAS. I thank the gentleman.

As soon as one or two questions are posed to the panel, the Chair intends to recess until 11:30, allowing the Members, if they want to leave now to take part in the vote on the floor.

But I will simply ask Mr. Thayer real quickly, when you mentioned the cease-fire, which I think is an appropriate phrase, I take it that you are in agreement with what has just been said by Mr. Stadelman and the others before you regarding the big business. Do you agree with the inadvertent inclusion of extension of the judicial review to big business?

Mr. THAYER. I am absolutely in accord. I think that this law really was intended from the outset. I think that our intent should always be to make sure that the law is applicable to the smallest of the small business, which it is.

Big business has the resources. They have the resources, and we see every day that they are truly making their voices known themselves, when they feel that they have been impugned in any way relative to regulation. So this was designed specifically for the smallest of small business. And I think that it puts the onus upon the Government and the agencies to reach out, as it has been alluded to earlier, and determine that impact, which they are blatantly not doing at present.

Mr. GEKAS. I thank the gentleman.

Mr. Stehlin, I had one question for you. Did the agencies that you told us lay a hand on your business? Did you have to hire any special personnel or executive officers in your organization to handle just those types of situations, a law firm or an accountant or someone?

Mr. STEHLIN. Yes, sir. Well we did all of that. In fact, as it has grown, there was a gentleman that was with a law firm. Now he is our executive V.P. That was the way that we finally had to do it to handle all of the regulatory problems.

Mr. GEKAS. Which, of course, means extra costs and burden?

Mr. STEHLIN. Yes, sir. And it is a thing that it just seems to grow out of proportion. And I keep thinking, as a small business where we started with a family of six and, of course, we had no associates or employees, and I still remember signing the check for the first employee, as I have watched this thing grow over its 15 years. This year, we just see the regulatory side continue to grow and grow. I have learned a lot here today for the first time.

Mr. GEKAS. Me, too.

Mr. Stadelman, one question for you, and that is, how did that moratorium to January 1, 1996, come about?

Mr. STADELMAN. I am not certain. I don't believe it was in the act. I think that was the only token effort given by the Department of Transportation to small governments, some recognition for time of implementation. That is my understanding of it.

Mr. GEKAS. You are aware that in many different forums in the 104th Congress, there is talk about moratoriums and stays on a lot of these regulations, and maybe we can use this as a model on how that could help the business community, and the local government.

Mr. STADELMAN. We would appreciate that.

Mr. GEKAS. With that, the Chair thanks the panel for their presence here today.

We will recess until 11:30, at which time we will hear the next panel.

[Recess.]

Mr. GEKAS. The time of the recess having expired and noting the presence of a quorum, we will proceed with the next panel, which consists of Donald Dorr, an attorney from Hanover, PA. No one had to tell me that. I will dwell a little bit on the appearance of Don because he and I served together in the Pennsylvania General Assembly for a lengthy period of time and we had the privilege of co-operating in some of the nice legislative developments of that era. He is also a successful attorney and a spokesman for small business and really for all the people in his area. We welcome Don with that special handshake.

James Carty is the vice president of Small Manufacturers for the National Association of Manufacturers and Kim McKernan is the director of house governmental affairs for the National Federation of Independent Business. Mr. Vladeck is here.

Mr. VLADECK. Thank you. I am.

Mr. GEKAS. You are with Public Citizen, I am told—

Mr. VLADECK. Yes. That is correct.

Mr. GEKAS [continuing]. In confidence here.

Mr. VLADECK. It has been made public.

Mr. GEKAS. All right. Thank you. Why don't we start with my personal friend, Don Dorr.

#### STATEMENT OF DONALD DORR, ATTORNEY, REPRESENTING THE U.S. CHAMBER OF COMMERCE

Mr. DORR. Thank you, Mr. Chairman, members of the subcommittee. My name is Don Dorr. I am a lawyer in general practice in Hanover, PA, which is a growing community just north of here across the Maryland-Pennsylvania border about 15 miles east of Gettysburg.

My law practice includes many small business clients and I am speaking today on behalf of the U.S. Chamber of Commerce. I am a member of the U.S. Chamber's Small Business Council. I have submitted a written statement for the record.

The chamber has 215,000 business members, 96 percent of which are small businesses with fewer than 100 employees. The chamber strongly supports the adoption of title VI of H.R. 9. We believe that the provision repealing the prohibition of judicial review of compliance with the Regulatory Flexibility Act is a key reform.

Members of this Congress surely are more aware than those of any Congress in recent memory of the frustration and anger among the small business community that is directed at government. This frustration is felt more keenly than any place else with the faceless bureaucracy that imposes duty after duty upon already overburdened citizens. In the RFA, Congress attempted to create policy that offered some relief to the small business community, but the potential of judicial review is essential to the effectiveness of the policy that was created with the passage of the act.

The executive branch of government should not be allowed to thwart the will of Congress with neither Congress nor affected citizens having any recourse. The Congress is focusing this weekend on the ongoing struggle for power between the executive and legis-

lative branches of government. In effect, by the action taken under the Regulatory Flexibility Act originally denying the judicial review aspect, Congress ceded territory to the executive branch that should not have been ceded.

Since the early days of the republic, the judicial branch has provided the recourse and it should be available in this instance. Without it, the executive branch can, as a practical matter, ignore the policy established by Congress. Small business people had hoped that the adoption of the Regulatory Flexibility Act in 1980 represented a victory in their battle to bring their problems to the attention of the executive branch.

Section 611 turned that hope into an illusion. Again, it seemed that government had taken away with the left hand what it had given with the right. In effect, section 611 it said to the bureaucrats, "Pay attention to small business. If you can help this community that creates most of the new jobs in our economy without detracting from the goals of the legislation, do so, but if that is too much work for you, if you aren't up to the requirement of innovative thinking or if you just plain don't want to, nobody will be in a position to do anything about it."

Section 611 makes this law like installing a traffic signal to help organize traffic patterns and then making sure that only the green lights work. We urge the repeal of 611 that is contained in title VI of H.R. 9. We also believe it is important that the General Counsel of SBA have the right to file amicus curiae briefs on behalf of the small business community at large in pending litigation.

The sense of the Congress provision in H.R. 9 will be helpful in strengthening that activity. The SBA should have a role in the development of the final product in the rulemaking process whenever small business will be affected. These provisions of H.R. 9 promoting that role should help the rulemaking process, preventing inadvertent failures to attend to regulatory flexibility requirements, as well as providing needed input from this important economic sector in the carrying out of Federal policy.

As I engage in discussions regarding the laws affecting small business people, whether it is across my law office desk or at local chamber meetings or U.S. Chamber meetings, I find small business people to be interested in the same goals as the Members of Congress. Clean air and water, safety in the workplace, fair treatment of their friends and neighbors who work for them are all high on their priority list, too.

After all, in most cases, they live in the communities where their businesses are located. They can be even more effective in helping our communities across America reach these goals if their Government will work a little harder to find ways to encourage compliance with its laws that are less time-consuming and burdensome to this hard-working innovative group of people. Congress can encourage this by passing H.R. 9. Thank you, gentlemen.

[The prepared statement of Mr. Dorr follows:]

PREPARED STATEMENT OF DONALD DORR, ATTORNEY, REPRESENTING THE U.S.  
CHAMBER OF COMMERCE

Mr. Chairman and members of the Subcommittee, I am Donald Dorr. I am a member of both the U.S. Chamber Board of Directors, and of Council of Small Business of the Chamber. The Chamber represents more than 215,000 businesses (96%



of which are small businesses with fewer than 100 employees), 3,000 state and local chambers of commerce, 1,200 trade and professional associations, and 72 American Chambers of Commerce abroad.

The Chamber strongly supports Title VI of H.R. 9, the Job Creation and Work Enhancement Act of 1995. This legislation recognizes both the paramount role that small business plays in the American economy and the debilitating cumulative impact of federal regulations on small business.

The intent of Title VI is not about shirking the small business community's social responsibility to maintain safe enterprises. Rather, it seeks to amend the Regulatory Flexibility Act of 1980 (RFA), which was designed to enhance the ability of small businesses to comply with federal regulations. Incidentally, the Chamber has always been strongly supportive of the regulatory flexibility effort, and were leaders in the effort to reform the RFA during the last Congress. We have also been principal leaders of the Regulatory Flexibility Act Coalition.

Small business people typically live where they work. Consequently, they care about such things as their environment and the needs of their employees, who are also their neighbors. The regulatory flexibility provided by the RFA was intended to help them ensure that they could meet these societal goals. Title VI, a part of the Contract with America, will fulfill that promise.

No one argues about the important role of small business in the American economy. According to a recent issue of The U.S. Small Business Administration's *The State of Small Business: A Report of the President*, 56.7% of working Americans are employed in small firms. The Small Business Administration (SBA) has determined that small business goods and services accounted for 52% of receipts (sales) in 1990. SBA statistics also indicate that, in recent years, small businesses have created the lion's share of new jobs, (emphasis added) and are expected to continue to do so. Given these demographics, it is essential that the federal government carefully consider the burden imposed on these entities.

As for the suffocating effects of federal regulation, I cite a late 1980's Arthur D. Little study stating that small businesses spend 1.2 billion hours and \$60 billion per year just filling out tax forms. This translates into approximately \$3,000 per business on *tax forms alone*. To our knowledge, these numbers have not been updated, so one can only guess at what the burden will be for 1995.

Tax mandates represent only a portion of the regulations that the federal bureaucracy imposes. As a member of the Chamber's Council of Small Business, I take part in discussions on virtually every issue that the Chamber considers and examine the ramifications of these for smaller firms. Thus, I have had the unique opportunity to see a cross-section of regulations and their cumulative effect on small business. Restrictive regulation goes hand-in-hand with measures varying from the Family Medical Leave Act (FMLA) to the Immigration Reform and Control Act to the Clean Air Act. While all of these examples of regulation are motivated by commendable social conscience, the cumulative costs of implementation are truly overwhelming for small entities. The proportionate cost of regulatory compliance is significantly higher for small firms.

The RFA was designed to provide the small business community respite from the ever-growing hindrance of excessive regulation. It lays out a multi-step process that, if followed, would avoid imposing excessive regulatory burdens on small business whenever possible. Federal agencies must assess the cost of compliance to small businesses and other small entities, genuinely consider alternative, cheaper ways to achieve the same goal, and either adopt the more cost-effective substitute or justify their reasons for rejecting it. It is a praiseworthy law with some fundamental flaws. Agencies do not have uniform guidelines to follow for complying with the RFA, rendering compliance inconsistent among the agencies. Agencies also do not have to answer to any compelling authority for noncompliance. The RFA specifically excluded the courts as reviewers in the interest of prompt execution. These deficiencies in the process have led to flagrant bureaucratic abuses of the RFA.

The RFA allows agencies to forgo an analysis if the regulation in question will not have a "significant economic impact on a substantial number of small entities." This provision has become a loophole by which agencies wrongly circumvent this crucial step. Often, they develop inaccurate conclusions to shirk their responsibilities and do little to justify those conclusions. The FMLA is an example. In the 91 pages of FMLA regulation, the Department of Labor devoted 25 lines to its scant regulatory flexibility considerations:

The Department has determined that such an analysis is not required for this rulemaking. This conclusion is based on the fact that FMLA only covers private employers of 50 or more employees, and public agencies. Small



entities, i.e., employers with fewer than 50 employees, are exempt (emphasis added).<sup>1</sup>

Clearly, many genuine small businesses have more than 50 employees.

Bureaucratic abuse of the RFA assumes other forms as well. The RFA exempted what it calls "interpretive rules" from analysis. Interpretive rules are those which are delegated by Congress to the appropriate agency with specific instructions. The rationale behind the exemption was that the agencies had little or no discretion in the rulemaking—their instructions were specific. The Internal Revenue Service has asserted that all of its regulations are interpretative rules and therefore are exempt from RFA analysis, an assertion has been strongly contested by the Chamber and the small business community for years. IRS regulations are indeed federal regulations and they undoubtedly pose significant economic problems for the small business community. This issue was taken up at the Senate committee level during debate on the original RFA; however, the debate resulted in an ineffective provision that lacked an authoritative executor and again, left the small business owner without a forum to voice his or her concerns.

These examples clearly highlight the need for two badly-needed changes to the RFA. First, although not a provision in H.R. 9, the SBA should be authorized to issue uniform guidelines for agencies' use in establishing their individual RFA compliance procedures. (EPA now performs a similar role in procedures.) This would serve the dual purpose of increasing agency compliance with the RFA and providing a rebuttable presumption of compliance if later challenged. Second, the current prohibition of judicial review of compliance must be lifted. Title VI would grant the courts jurisdiction in those cases where the needs of the small business community have been sacrificed in the interests of expediency. The members of the Committee must understand that this legislation would not render the regulatory process more litigious but rather ensure its equity.

Although the Chamber views the institution of uniform guidelines for RFA compliance as critical, and the provision regarding judicial review as the dominant thrust, H.R. 9 does contain several other provisions to strengthen the original RFA. In the RFA, the Chief Counsel for Advocacy at the SBA was charged with defending small business's interests in the federal regulatory process. Occasionally, lack of deference on the part of federal agencies has rendered the seat less effective. H.R. 9 would require agencies to give the Chief Counsel a "preview" of proposed rules a full month before opening them to public comment. This would potentially help ensure that a fair analysis has indeed been completed and would hopefully "nip poorly developed rules in the bud," thereby reducing conflict in the later stages of the regulatory process.

Finally, Title VI explicitly grants the Chief Counsel the authority to file *amicus curiae* (friend of the court) briefs in cases that significantly impact the small business community. Although the original RFA did contemplate the filing of such briefs, the Chief Counsel's attempts to do so in the past have met with considerable opposition. We see value in permitting the Chief Counsel to bring the plight of the small business person to the courts' attention.

The last Congress nearly saw reform of RFA enacted. The Senate adopted an amendment to the National Competitiveness Act that would have done so, and the House, by an overwhelming margin, passed a motion to instruct the conferees to accept the language. Regrettably, the conferees were unable to agree on the underlying bill, and RFA reform failed.

Small businesses have too often borne the brunt of the cumulative impact of federal mandates. Given their importance to our struggling economy, we must ensure not just their survival, but their growth as well. This proposal is not "sweeping" legislation—it is simply an opportunity to enhance and expand on the intentions of past Congresses. The RFA is a plain example of policy that has been neutralized through years of bureaucratic misapplication. We urge you to support Title VI of H.R. 9, and put the "teeth" back into the RFA. This Congress has the opportunity to enact this long overdue change.

On behalf of the U.S. Chamber of Commerce, I thank you for this opportunity to present our views and I welcome any questions from this Subcommittee.

Mr. GEKAS. We thank the gentleman and without objection we will include his written statement in the record. Now we will hear from Mr. Carty.

<sup>1</sup>The Family and Medical Leave Act of 1993, Federal Regulations Part 825. U.S. Department of Labor Employment Standards Administration, Wage and Hour Division; June 1993, p. 39.

**STATEMENT OF JAMES P. CARTY, VICE PRESIDENT, SMALL MANUFACTURERS, ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS**

Mr. CARTY. Mr. Chairman, thank you very much. I will summarize my statement and like my statement to be entered into the record.

Mr. GEKAS. Without objection, the inclusion of your record will be ordered.

Mr. CARTY. Thank you. The NAM wishes to thank you and the other members of the subcommittee for inviting us to testify on this very important legislative proposal. NAM is the largest and oldest manufacturing trade association in the United States with over 13,000 members. It is a point of fact we were founded 100 years ago, January 1895, and now we are celebrating our centennial.

The judicial review of regulatory flexibility is a bipartisan effort that is something that should have occurred in the past, but I think it is going to occur this year. The Government requires its citizens, both business and individuals, to comply with the law. We think it is about time that the Government also complies with the law. There were very specific requirements placed upon the agencies and the Federal Government that are not being complied with.

The representatives from SBA laid out the reports that they have filed where year, after year, after year, there has been continual violation of Reg Flex, the Paperwork Reduction Act and the other myriad of acts that are upon the books. We think that it is about time that individuals and businesses be given the opportunity to challenge the agencies when they do not comply with the minimum requirements of the Regulatory Flexibility Act.

The manufacturing community is heavily regulated from A to Z, IRS, EPA, OSHA. You name it, we have to comply with it and they do to the best of their ability. However, the small manufacturer is at a severe disadvantage. If you have ever looked at or tried to read the Federal Register, you understand why. It is almost impossible to get through the Federal Register without falling asleep. The print is small, the type is irregular and the terminology that is used there, you have to have a Ph.D. in chemical science or electrical engineering, et cetera.

The estimated cost of Federal regulation is approximately 9 percent of the gross domestic product. Just the filing of papers and the keeping of records, according to OMB, is roughly a \$100 billion cost. Recently, the Federal Register in November 1994 came out with the regulatory agendas of the approximately 65 Federal agencies here in Washington. That document ran 1,690 pages of regulations that the agencies will be looking at during 1995. That is a staggering total. And I bet if you look at the Federal Register any day, you will come across rules and regulations that just on their face can have an impact on small business. And I bet 9 out of 10 times you will find a little statement in there that the agency head has certified that the Regulatory Flexibility Act does not apply.

For example, in June 1994, EPA issued a proposed regulation dealing with maintenance—aircraft maintenance facilities dealing with hazardous air pollutants. EPA stated in the proposal that there were 2,600 aircraft facilities, maintenance facilities involved. And then at the last page of the proposed regulation that ran on

for about three or four, five, six pages, they made the claim that the Regulatory Flexibility Act did not apply. We called this to the attention of OIRA, Office of Information and Regulatory Affairs and unfortunately they agreed with EPA.

Another example is the Pension Benefit Guaranty Corporation. In May 1994, they came out with a proposal in order to satisfy some indebtedness. They were going to provide for a set-aside for third-party contractors with the Government. Now, you know and I know there are thousands of small business contractors with the Government. And this proposal would potentially impact upon them. We called this to the attention of OIRA again.

This time they agreed with us that the PBGC proposal could have an impact upon small businesses and that the agency should take that into consideration. I just came across one which I am interested in because it deals with payment of employee expenses for club dues, meals and entertainment and spouse travel, which applies to all businesses in the United States. The question is whether or not it is income or not. The IRS, in the proposed regulation, makes the claim again that it doesn't apply to small identity.

Mr. GEKAS. Small what?

Mr. CARTY. Small identity, small businesses, et cetera. Just on the face of this document, as you know, when you deal with the IRS, unless you have a piece of paper or something other than your own word, they are not going to believe you. But they made the flat statement that there would be no impact upon the small business community, that Reg Flex did not apply.

Now you may say it is minimal. Well, how do they know that? They don't even recognize it. They should at least raise the question. And this happens constantly, day after day in the Federal Register. There is absolutely no attention being paid to that law. And we think that it is high time that businesses be given the ability to take the agencies to court over that issue.

Let me also point out something, too. Section 610(a) of the Regulatory Flexibility Act also provides for a look-back. That is, the agencies will be required to go back starting in 1980 and look at their regulations on the books and try to make them consistent with the mandate of the Regulatory Flexibility Act; that is, to construct them so they will have the minimal impact on small businesses.

As far as I know, very few agencies have even attempted to comply with that look-back provision. Congress, in its wisdom, even said, well, 10 years may not be enough. We will give you an additional 5 years. That is 15. Well, this is the 15th year since the passage of the Regulatory Flexibility Act.

I bet if you asked, there may be very few agencies that have complied with this provision, section 610 of the Regulatory Flexibility Act.

Mr. Chairman, thank you very much for your time. We appreciate the opportunity to testify and we would hope that this subcommittee and the full committee will move this legislation along quickly.

[The prepared statement of Mr. Carty follows:]



PREPARED STATEMENT OF JAMES P. CARTY, VICE PRESIDENT, SMALL MANUFACTURERS, ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

The National Association of Manufacturers (NAM) welcomes the opportunity to testify in support of a proposal to strengthen and to provide judicial review for implementation of the Regulatory Flexibility Act of 1980. The need for such reform is an idea whose time has come. A bipartisan majority of Congressmen and Senators supported such legislation during the 103rd Congress. Vice President Gore's National Performance Review supports the change.

The NAM is the nation's oldest and largest broad-based industrial trade association. Its more than 13,000 member companies and subsidiaries, including 9,000 small manufacturers, are located in every state and produce approximately 85 percent of U.S. manufactured goods. Through its member companies and affiliated associations, the NAM represents every industrial sector, 185,000 businesses and more than 18 million employees.

Founded one hundred years ago in Cincinnati, the NAM is proud to celebrate its centennial in 1995.

The burdensomeness of federal regulations is dramatized by a University of Rochester study (1993) that concluded that the cost to the private sector to comply with regulations was at least \$430 billion annually. Stated another way, the cost of compliance is the equivalent of 9 percent of our gross domestic product. There are a number of indications that predict that the flow of regulations will continue to grow.

The *Federal Register*, the "bible" for federal regulatory activity, was in excess of 68,000 pages for 1994. We expect the *Register* will continue to grow in size with the regulations that will be generated from Clean Air Act amendments, the implementation of the Americans with Disabilities Act, and others. A week after the election, the *Federal Register* published, with very little fanfare, the regulatory plans of 64 federal agencies that laid out their agendas for 1995. Basically, these agendas set out actions that delete some rules, amend or add even more. The complexity and scope of the subjects covered can be surmised from the fact that 1,690 pages of the *Register* were taken to set out the plans of the myriad of agencies doing business in the nation's capital.

The final factor to be considered is that, according to the civics books, the government is composed of three branches. But if you work in Washington, you know that there is a fourth branch and that encompasses the bureaucracy that directs and operates the various agencies. The recent election will have very little effect upon the leadership of these agencies and, in fact, we can expect an influx of former "Hill" staffers moving to the agencies—aided by the Ramspeck Act, a little-known law passed in 1940 that gives preference to former congressional staff members for employment in executive branch agencies, without having to go through normal civil service procedures. Thus, you now have the staff that helped write the laws in a position to enforce them. Taken together, these factors could indicate a continuation and even an acceleration of the regulatory flow from Washington.

For a number of years we have been hearing from our members, both large and small, about the ever-increasing flow of regulatory and paperwork requirements being placed on them by the federal government. It is estimated by the Office of Management and Budget (OMB) that just the cost of paperwork is more than \$100 billion per year. The rules have grown more complex, and very often a violation of a rule or regulation can result in a high fine or even a criminal indictment for activity that had never been considered criminal activity.

But the agencies are not solely responsible for the increase. Congress has played an important role in the growth of burdensome regulation by the ever-increasing creation of new and expanded laws requiring more and more federal control and direction. Besides looking at the activity of agencies, we think it is time for Congress to stop and ponder the effects its proposals have on the economy and our people.

The Regulatory Flexibility Act of 1980 (RFA) was enacted to provide relief to the small business community by requiring the agencies to determine if a proposed rule would unduly impact upon small businesses and to then determine ways that the regulations could be implemented to reduce or eliminate the impact upon small business. RFA Sec. 603 (c), Title V, USC, states: "Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as—

- (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;



(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities."

A cursory review of the *Federal Register* over any length of time will rarely find these specific requirements being met by any federal agency. Usually, you will find a statement that the RFA does not apply, or that the impact upon small businesses is minimal with no analysis provided to support this claim.

The RFA has been a failure for a number of reasons, one of which is the inability of the affected small businesses to sue for relief from an agency that either fails to comply with the RFA or pays lip service to the Act by claiming that the Act does not apply to a particular proposal because it does not have an impact on small business. There are many instances of this occurring; for example:

In June 1994 the Environmental Protection Agency (EPA) proposed emission standards for hazardous air pollutants for aerospace manufacturing and rework, i.e., maintenance, cleaning, repainting, etc. According to EPA's own estimates, more than 2,800 facilities would be covered by the proposed rule for this industry. Many of these facilities we believe are small businesses. The EPA, in the proposal, made the categorical statement that RFA did not apply to the proposal; therefore EPA was not required to do a regulatory flexibility analysis. This failure of EPA to carry out the minimal requirements of the RFA were called to the attention of the Office of Information and Regulatory Affairs (OIRA), but that office declined to take action.

In May 1994 the Pension Benefit Guaranty Corporation (PBGC) proposed a rule regarding debt collection by administrative offset of payments to be made to contractors by third party agencies for government work performed under a contract. The PBGC made the claim that the RFA did not apply because the rule would not have a significant economic effect on a substantial number of small entities. This assertion was challenged and OIRA agreed that the proposal could have an effect on small businesses and directed the PBGC to take cognizance of the possible impact in its future rulemaking and to consider the necessary action to alleviate the impact on small businesses.

To make the RFA an effective tool to reduce unreasonable, burdensome regulation, the NAM recommends that small businesses be allowed to bring legal action against a federal agency that fails to comply with the minimal requirements of the RFA.

The NAM also recommends that an agency like the Small Business Administration be given the job to enforce compliance with the RFA and not just to file reports on the lack of compliance. This addition would strengthen the RFA by giving a specific agency responsibility for its enforcement. With this suggested change, we see fewer legal actions by individual companies challenging agency actions.

This completes my prepared statement. I welcome questions from the Committee.

Mr. GEKAS. Real quickly, would 610(a) be retained under the proposed legislation?

Mr. CARTY. Yes.

Mr. GEKAS. Yes. Our next witness, Ms. McKernan.

#### **STATEMENT OF KIM F. MCKERNAN, HOUSE DIRECTOR, FEDERAL GOVERNMENTAL RELATIONS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS**

Ms. MCKERNAN. Mr. Chairman, my name is Kim McKernan and I am the house director of Federal governmental relations for the National Federation of Independent Business (NFIB). NFIB is the Nation's largest small business advocacy organization representing more than 600,000 small business owners across the country.

The typical NFIB member has five employees and generates about \$250,000 in gross annual sales. NFIB determines its public policy positions through regular polling of our membership. Thank you, Mr. Chairman, for inviting NFIB to testify today about strengthening the Regulatory Flexibility Act. I would like to ask that my written testimony be submitted for the record.

Mr. GEKAS. Without objection, it is so ordered.

Ms. MCKERNAN. Government redtape, regulations, rules and paperwork are the bane of small business owners. In a 1992 survey entitled, "Small Business Problems and Priorities," small business NFIB members identified government regulation and paperwork as the fastest growing problem for small businesses.

In our 1994 survey of small business economic trends, regulations and taxes were the top two areas of concern. And this is why small business has such a high stake in the outcome of the debate on H.R. 9, the Job Creation and Wage Enhancement Act of 1995, and specifically with title VI, strengthening regulatory flexibility.

It is equally true that America as a whole has a huge stake in how small business fares in whatever regulatory and economic legislation this Congress passes because small business plays a unique and rather remarkable role as a job creator and provider of personal opportunity, security and independence for millions of Americans.

Since the early 1970's, small firms have created two of every three jobs in this country. Small business is the engine of economic growth and the backbone of our American economy. Unfortunately, the costs and burdens created by Federal regulations fall predominantly and disproportionately on the very people our Nation relies upon to create the jobs—small business owners.

Reform of the Regulatory Flexibility Act is the cornerstone to addressing the stifling impact of government regulations on economic growth and prosperity and is a top priority for NFIB. In this new Congress, we are hopeful the President would adhere to his position of last year in which he stated, "My administration will continue to work with Congress and the small business community next year for enactment of a strong judicial review that will permit small businesses to challenge agencies and receive meaningful redress when agencies ignore the protection afforded by the statute."

With regard to the impact of regulations, the statistics speak for themselves. Several studies show the direct costs of regulatory compliance for businesses is in the range of \$400 billion to \$800 billion, including Vice President Gore's National Performance Review.

Complying with regulations costs our economy dearly. The losses due to regulation exceeds the benefits by more than a trillion dollars per year. This hidden tax of complying with regulations is no less a tax than any other government levy. And when it comes to businesses, it is a regressive tax that hits the little guy the hardest.

The avalanche of regulations continues to smother small businesses. For example, there were 65,000 pages in the Federal Register in 1994. That is a 20,000-page increase since 1986. Just remember how small the print is on each page of the Federal Register and then one can begin to conceptualize the burden of the regulatory avalanche.

The principal reason why smaller businesses bear a heavier regulatory burden than larger businesses is economies of scale. Regulations present a fixed cost to all businesses. However, the smaller firm will have a compliance cost that is far higher than that of a large business. Simply put, small business is not equipped to deal with overzealous regulations. Walk into any small business on

Main Street and look for the accounting department, the legal counsel or the human services department. You won't find them. Hence, the need for regulatory flexibility.

The Reg Flex Act was enacted in 1980 to help ease the regressive one-size-fits-all regulatory process. It was intended to force regulators to consider the differences between big and small businesses. Unfortunately, under current law, there is no way to enforce the compliance of regulators with the Reg Flex Act and many government agencies ignore it because they know it cannot be challenged in court. Thus, the need for judicial review.

With a judicial review provision, an agency that failed to adequately consider the economic impact on small business could be challenged in court. NFIB strongly supports the judicial review component to the Reg Flex Act included in the Contract With America. In addition, we strongly recommend that any judicial review language give judges the authority to stay a rule as soon as they question its compliance with Reg Flex.

And, finally, we believe that it is of utmost importance that a sufficient amount of time be allowed for small business owners to discover and evaluate the impact of a final rule. We hope that any Reg Flex reform legislation includes a broad basis for standing so that affected small businesses or small business representatives are not restricted in challenging a rule under Reg Flex.

The regulatory situation for small business is truly approaching crisis proportions. More and more small businesses are literally being crippled by government regulations. Their message to Washington is plain and simple—get the Government off our backs, out of our pockets and off our land so that we can pursue the American dream and do what we do best—build businesses, create jobs, provide for our families and make meaningful and constructive contributions to our communities.

Thank you, Mr. Chairman, for allowing me to testify today on behalf of NFIB's 600,000 small business owners and their employees.

[The prepared statement of Ms. McKernan follows:]

PREPARED STATEMENT OF KIM F. MCKERNAN, HOUSE DIRECTOR, FEDERAL GOVERNMENTAL RELATIONS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. Chairman, my name is Kim McKernan and I am the House Director of Federal Governmental Relations for the National Federation of Independent Business (NFIB). NFIB is the nation's largest small business advocacy organization, representing more than 600,000 small business owners in all 50 states and the District of Columbia. The typical NFIB member employs five people and grosses \$250,000 in annual sales. NFIB's membership mirrors the nation's industry breakdown with a majority of its members in the service and retail sectors.

I want to thank you Mr. Chairman and the Committee for having me here today to discuss one of the most frustrating and aggravating problems facing small business owners today—government regulation, paperwork, and red tape. But before I go into the horrors of regulation, it is important for the Committee to understand the composition of the business community and some demographics of small business owners.

First, it is important to look at the business community as a whole. One inaccurate perception in this country is that all business is big business. This is not correct. There are five million employers in the United States today. Of those five million, 60 percent of them employ 4 employees or fewer and 94 percent employ fewer than 50 employees. These figures illustrate a fact that is typically lost during debates on the impact of certain legislation and regulations—small business by pure volume dominates this country's economic engine.

Another misleading perception is that a small business is a smaller version of a big business. Nothing could be further from the truth. For example, one-half of



small business owners start their business with less than \$20,000, most of which is from personal or family savings. Most small business owners do not make a lot of money (40 percent earn less than \$40,000); they survive on cash flow not profitability. Start-up small businesses are the most vulnerable. Of the 800,000 to 900,000 businesses that start each year, half will be out of business within five years. Many small business owners will tell you that the burden of regulation has much to do with whether they survive or perish. While it is rough going at the start, the small businesses that do make it are the major job generators in this country. From 1988 to 1990 small business with fewer than 20 employees accounted for 4.1 million net new jobs, while large firms with more than 500 employees lost 501,000 net jobs.

Many in Washington have noted the absence of a consensus on a great number of issues facing this country. But there is growing bipartisan agreement about a phenomena that is taking place in America's small business sector—the burden created by federal regulation falls predominantly and disproportionately on the very people who we rely upon to create jobs, small business owners. To that end, I would like to focus on four topics today. First, I will describe to the Committee the frustration small business owners face dealing with regulations. Second, I will explain why NFIB believes the Regulatory Flexibility Act is important and why it needs to be strengthened. Third, I will discuss broader efforts to accomplish regulatory reform that NFIB has supported for years, many of which are part of the Contract with America. And finally, I will share with you NFIB's reasons why outdated laws and regulations need to be reviewed and changed.

### THE COSTS AND HORRORS OF REGULATIONS

Small business owners across this country are being trampled by the costs and burdens associated with regulations. The evidence is abundant and also easily convincing. NFIB has gathered it from our own research, others in Washington researching this issue, and most importantly from individual members who are struggling to comply with the federal government's web of regulations.

The NFIB Education Foundation, NFIB's research arm, published in 1992 an extensive survey entitled "Small Business Problems and Priorities." It looked at and ranked the top 75 problems facing small business. And to the surprise of many, problems relating to regulation and government paperwork were the fastest rising area of concern in the entire survey. In the most recent data available from the NFIB Education Foundation's monthly "Small Business Economic Trends," taxes and regulations were the top problems facing small businesses in America.

Another NFIB Education Foundation study ("New Business in America") clearly illustrates the impact regulations have on new businesses, which create about one-third of the new jobs in the economy. The study found that of all the challenges faced by a new business, owners are least prepared to deal with government regulations and red tape, and are generally surprised by the extent to which government plays a role in their business.

When looking at the data it is easy to see why regulations are the fastest growing concern to small business owners. The dead-weight loss to society from regulation is estimated to be more than \$1 trillion dollars per year. By dead-weight, I mean that the losses due to regulation exceed the benefits of the regulation by more than \$1 trillion per year.

According to studies done by Thomas Hopkins of the Rochester Institute of Technology and William G. Laffer III and Nancy Bord of the Heritage Foundation, the direct costs of regulatory compliance to businesses that are associated with regulatory compliance are somewhere in the range of \$500 billion to \$800 billion dollars. The current Administration pointed out in its *National Performance Review* that the compliance cost imposed by federal regulations on the private sector were at least \$430 billion per year or 9 percent of GDP.

Complying with regulations costs our economy dearly. The hidden tax of complying with regulation is no less a tax than any other government levy. And when it comes to businesses, this hidden tax is regressive; it hits the "little guy" the hardest.

There are several reasons why smaller businesses bear a heavier regulatory burden than larger businesses. One reason has to do with the fixed cost aspect of regulation. Almost all regulations have some fixed costs. Fixed costs are independent of output, i.e., any company affected by the regulation pays the same fixed cost. An example of fixed costs would be a requirement that every firm complete a lengthy quarterly report submission to a regulatory agency. It would cost every firm the same amount to complete the report.

But larger firms can spread the fixed costs over large quantities of output. The average fixed cost or fixed cost per unit of output is low, therefore, it has only a



small effect on price. The smaller company with the same fixed cost, but lower levels of output, has a much higher fixed cost per unit of output. If the smaller firm passes the cost on to the consumer by raising prices, fewer will buy the product at the higher price and profits will fall.

This is a technical explanation, but simply put, small business because of economies of scale is not equipped to deal with federal regulations. Walk into any small business and look for the accounting department, the legal counsel, or the human resources division. You will not find them.

Unfortunately, the case I just made has never been understood by bureaucrats. The avalanche of regulation continues to pummel the small business owner. Case in point, there were 64,914 pages in the *Federal Register* in 1994, this is compared to 44,812 pages in 1986—an increase of 20,102 pages. Just remember how small the print is on each page of the *Federal Register* and one can begin to conceptualize the burden of the regulatory avalanche.

The letters we receive from NFIB members speak louder than statistics. For example, a small construction company inquired about bidding on a small remodeling project at a post office in South Dakota. The owner says he received 34 pages of plans, 400 pages of building specs and a 100 page book of bidding instructions. Of these instructions, this small business owner wrote in a letter to the U.S. Postmaster, "If [your] goal is to discourage prospective bidders, I'm sure [you have been] successful."

Then there is the woman from Connecticut who used her and her husband's family savings to open a small manufacturing business. She says, "While these regulations start out with good intentions, the end result is that many become confusing and are too onerous for a small business owner like myself to deal with effectively. As a result, the employees also suffer. The money we spend simply trying to comply with these rules could be better spent on the growth of our business, creating more jobs and benefiting our current employees."

As an example she points to certain OSHA rules. "There's the lockout/tagout requirement that needs a manual basically to say if a machine is not functioning properly, turn it off, pull the plug and make sure nobody else uses it until it's fixed. Of course, in a small shop like ours, with few machines, everyone knows when a machine is broken, and the machine is fixed immediately or we can't produce. There is the Material Safety Data Sheets, which is a listing for various types of hazardous materials which must be kept track of. Yet, after some searching, I am still unable to find someone knowledgeable on these substances and where they are found exactly."

Then there is the small business owner who is confused by the I-9 immigration forms. She writes, "It reads something like a Chinese food menu."

Yet another example is the woman small business owner from Florida who comments on small business's inability to secure financing because of government regulation, "... red tape or paperwork is the single biggest obstacle in securing small business financing today. Business owners are often totally discouraged and disgusted with the amount of paperwork required for lines of credit, small business loans, home equity loans, etc. And the costs involved in closing a loan due to regulations that must be enforced are staggering. Commercial appraisals have risen from approximately \$1,000 to \$2,500. Documentary preparation fees have risen from \$0 to \$250. A recent small business loan of \$300,000 secured by real estate had closing costs of a whopping \$8,600 or 2.9% of the loan value—all attributable to new regulatory guidelines."

Finally, a small business owner from Maryland illustrates what is wrong with the system, he states; "Under current operating rules, OSHA representatives cannot consult or advise us—if they come on our job sites they can only write citations. You must certainly understand that this engenders an 'us vs. them' mentality if we are visited." He goes on to explain, "Currently, even the smallest error in safety can result in an expensive fine or many hours of letter writing, meetings, lawyers and management hours expended. This is so because in the present context OSHA has admitted that the penalty structure is designed not to improve safety but rather to raise revenue."

#### NEED FOR STRENGTHENING THE REGULATORY FLEXIBILITY ACT

There are many things that can be done to ease the burden of regulations that are placed on the backs of small businesses. A great place to start would be to strengthen the Regulatory Flexibility Act.

As this Committee knows, the Regulatory Flexibility Act of 1980 is not protecting small business from regulatory burdens as it was originally intended. The Regulatory Flexibility Act was designed to ease the regressive impact of "one-size-fits-all"

regulations on small business. It was supposed to force regulators to consider the differences between big and small businesses.

Under the Regulatory Flexibility Act (Reg-Flex), agencies issuing regulations must analyze and describe the impact the regulation would have on small businesses and other small entities. The analysis is supposed to outline possible alternatives to the proposed rule which would accomplish the same objectives at a lower economic impact on small business.

At the same time the final rule is issued, the changes (or lack of changes) made to the regulation on behalf of small business are also published. If a less costly alternative for small business was not adopted, an explanation must be published by the agency.

Sounds good, doesn't it? Here's the problem—there is no way to enforce compliance of regulators with Reg-Flex. Section 611 of the original Act includes a specific prohibition on judicial review of Reg-Flex analyses. Because Reg-Flex is not enforceable, agencies like the Internal Revenue Service and the Department of Defense, exploit the loopholes and ignore the Reg-Flex Act. Small business needs a hammer to force agencies to comply. That hammer is judicial review, or judicial enforcement, which will allow an agency's compliance with Reg-Flex to be challenged in a court of law.

In the 103rd Congress under Congressman Tom Ewing's and Senator Malcolm Wallop's leadership, both Houses of Congress overwhelmingly approved judicial review to the Regulatory Flexibility Act. Unfortunately, the National Competitiveness Act, which was the vehicle for this needed reform, never made it to the President's desk because of disputes with other provisions in the legislation.

In this new Congress, we are hopeful the President will live up to the tone he set in his letter to the Senate last year. He stated "my Administration will continue to work with Congress and the small business community next year [1995] for enactment of a strong judicial review that will permit small businesses to challenge agencies and receive meaningful redress when agencies ignore the protections afforded by this statute." His support for strong judicial review was echoed in additional letters by the Administrator of the Small Business Administration, Phil Lader, and by the President's Chief of Staff, Leon Panetta.

NFIB has developed a series of recommendations we believe will strengthen the Regulatory Flexibility Act.

1. Repeal the prohibition on judicial review.

2. As long as a small business can prove that it is, or it will be, adversely impacted by a regulation, we believe the firm should have standing and be allowed to challenge a Reg-Flex analysis that was incorrectly certified, was not done at all or was flawed in its analysis.

3. NFIB believes a business should have at least one year—preferably two—from the time the final rule is published to challenge the Reg-Flex analysis. We oppose requiring businesses to have commented on the regulation during the initial comment period in order to have standing and challenge the analysis in court.

4. Courts should have the ability to "stay"—or put on hold—federal regulations before them if they question the Reg Flex analysis and the potential adverse economic impact on small businesses.

5. If an agency continues to ignore small business and their responsibilities under Reg-Flex, after being ordered by the court to reconsider their Reg-Flex analysis, the court should have the ability to grant such other relief as it deems appropriate.

6. Finally, we believe that agencies should consider not only the direct effects of regulations, but the indirect effects as included in the Contract with America.

NFIB is committed to ensuring small business owners receive strong and effective judicial review under the Regulatory Flexibility Act and look forward to the President signing a bill into law that will accomplish this.

#### THE NEED FOR BROAD REGULATORY PROCESS REFORM

There are other reforms that would help significantly reduce the impact of the federal regulatory burden.

Many of the regulatory reforms that NFIB has been fighting for are included in the Contract with America. NFIB supports the reforms outlined in the Contract with America.

One of these reforms would be to strengthen the Paperwork Reduction Act (PRA). Let me start by making one thing clear—paperwork is regulation and regulation is paperwork. The PRA, signed into law in 1980 like the Regulatory Flexibility Act, addresses the problem of growing paperwork burdens. The law created within OMB



the Office of Information and Regulatory Affairs (OIRA) to review and approve—or, if too burdensome or unnecessary, disapprove—all paperwork requests agencies want to impose on the American people. However, because of a dispute between Members of Congress over the scope of its role, this paperwork reduction office has not been reauthorized since 1989.

The law was further weakened by a Supreme Court decision, *Dole v. United Steelworkers*, which exempted from OIRA's review any government forms that do not have to be returned to the federal government (such as I-9 forms). The third party paperwork requirements account for about one-third of all government paperwork. There has also been a problem with agency noncompliance with the Act.

Lengthy negotiations in both Houses of Congress finally produced a compromise reauthorization bill last year. It would have reasserted a central role for OIRA to act as the government's clearinghouse for paperwork and overturned *Dole v. United Steelworkers*. It also affirmed a five percent per year government paperwork reduction goal.

This year NFIB hopes Congress will go even further to control and reduce the avoidance of government paperwork burying small business owners. First, government paperwork demands on small business need to be reduced by 10 percent per year. After five years of 10 percent reductions, we need to impose a paperwork budget. The only way government would be allowed to create new paperwork requirements would be to eliminate existing requirements—quite simply, a zero sum game.

Another proposal to control overzealous regulations would be to enact a regulatory moratorium. It would stop the bleeding and allow the federal government to take a step back and look at what is really necessary and what is not.

NFIB supports the efforts of Congressman Tom DeLay and Congressman David McIntosh to pass H.R. 450, The Regulatory Transition Act of 1995. They are to be commended for their efforts to craft legislation that will allow the government to stop the steady flow of new rules that frustrate small business owners, while at the same time allow the promulgation of needed regulations to continue.

Under H.R. 450, a regulatory moratorium would be imposed, beginning November 9, 1994 and ending June 30, 1995, on new rulemaking actions by the federal government. The President would be required to publish a list of all regulatory rulemaking actions covered by the moratorium 30 days after the date of enactment. Many onerous regulations that could harm small business would be put on hold and have to be reevaluated.

The opponents of H.R. 450 paint this as a draconian tactic to stop the government from meeting its responsibilities under the law. They portray its effect as harmful to public health and safety. That's not H.R. 450's intent. It's meant to stop the bleeding and force the regulators to step back and reevaluate the impact of their actions on small business owners and over other regulated, frustrated citizens.

Much thought and effort went into drafting H.R. 450. It exempts certain needed regulations from the overall moratorium, including any rule that would streamline or reduce regulatory or administrative action, as well as license and registration approvals.

More importantly, H.R. 450, allows for "Emergency Exceptions; Exclusions." In other words, "exceptions" could be granted in response to written requests from agency heads via Executive Order by the President because of an "imminent threat to health or safety or other emergency" or "for the enforcement of criminal laws." Surely, this allows government to continue to operate to protect the public welfare.

These "Emergency Exceptions; Exclusions" are important to small businesses as well. Indeed some regulation is required. Small business owners care about the environment in which they live and do business. The land that surrounds them is part of their community and their employees are like family, so their health and safety is a top priority. And it is more than just their personal relationship with their employees that motivates their actions. As one small business owner from Maryland said, "Put bluntly, the market place demands a safe workplace. You cannot afford to do otherwise." H.R. 450, the regulatory moratorium, is a proper step toward reducing the growing impact of regulation on small business owners.

Beyond these two very important regulatory reforms there are many others that should be considered. For example, Congress should strengthen private property rights protections and restrict takings. With federal land regulation continuing to increase, small business property owners are increasingly denied the use of their land by government enforcement of environmental laws. The language of the U.S. Constitution's Fifth Amendment must be reaffirmed: The federal government may not "take" private land without paying the owner fair market value. In a recent NFIB "Mandate Ballot," 81 percent of NFIB members said landowners should be compensated when federal actions reduce the value of property.

Another effective tool in the war against excessive regulation is requiring federal regulators to use risk assessment/cost benefit analysis or a regulatory impact analysis when writing their rules. The federal government often implements new laws and regulations without any thought or recognition of the costs imposed on businesses and jobs. Congress must ensure that no new requirements are put on the books unless the benefits clearly outweigh the costs of the action and there should be a clear understanding of what the nation is getting in return. NFIB believes that any new laws or regulations must provide benefits that outweigh costs and that the methods used to calculate the impact are reasonable and responsible. Moreover, survey data tells us NFIB members overwhelmingly support the concept of a regulatory impact analysis that is included in the Contract with America.

One way to get a grip on the skyrocketing costs of regulations is to establish a regulatory budget. A regulatory budget should be established that would require federal agencies to disclose the costs their regulations will impose on both businesses and individuals. NFIB supports this proposal in the Contract with America that ensures that the growth and cost of regulation is curtailed.

Finally, agencies should be required to sunset regulations every five years. The federal government has on its books a large number of regulations that have long since outlived their effectiveness. Regulations should not have a life of their own. A requirement to sunset and reauthorize all government regulations would force Congress and agencies to review each program's merits and effectiveness before it can be reestablished.

#### NEED FOR REVIEW OF CURRENT LAWS

Many of the regulations and paperwork requirements that have frustrated small business owners come from laws which are dated and need to be reviewed, or by laws that simply restrict small business owners for no good purpose. One simple way for Congress to ease the regulatory burden is for it to review and even rewrite laws such as the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA), the Americans with Disabilities Act (ADA) and Superfund, to name a few.

For example, the FLSA is one of the worst in terms of the paperwork regulation it imposes on small employers. NFIB continuously hears complaints from our members regarding wage and hour reporting requirements. The administrative and paperwork burdens caused by this law should be reduced so that small employers can comply more effectively and avoid costly mistakes that could shut down their businesses.

Another example of how the FLSA is outdated is the overtime requirements it imposes. Unlike public sector employers, private sector employers may only provide extra financial compensation to employees for overtime work. To many employees, additional time off is at least as valuable as extra money. Yet, the law prohibits employers from offering time-and-a-half compensatory time instead of time-and-a-half monetary premiums. NFIB believes that Congress needs to fix this dated regulation that restricts both employer and employee.

All of the laws mentioned have examples of regulations that are not small business friendly or sensitive. They, and a host of other old statutes, need to be reviewed and rewritten where needed.

#### CONCLUSION

Mr. Chairman, NFIB small business owners spoke loudly on November 8. Their message to Washington was plain and simple—get government off our backs, out of our pockets, and off our land so we can do what we do best: build businesses, create jobs, provide for our families and make meaningful and constructive contributions.

Strengthening the Regulatory Flexibility Act is a great place to start to help them. But please do not stop there. I strongly urge this Committee to act quickly on the regulatory reforms in the Contract with America and those that I have outlined that move beyond it.

The regulatory situation for small business is approaching crisis proportion. More and more small businesses are being literally overwhelmed by regulations. I have given you the horrifying statistics on the out of control regulatory freight train. Please do not let this train wreck another small business and keep it from being the engine of our economy.

Thank you, Mr. Chairman, for allowing me to testify today on behalf of NFIB's over 600,000 small business owners. I thank you for the work you have done in this area already and I thank you in advance for your leadership on these issues in the 104th Congress.



Mr. GEKAS. We thank you and we will return to you momentarily. Mr. Vladeck.

# STATEMENT OF DAVID C. VLADECK, ESQ., PUBLIC CITIZEN LITIGATION GROUP

Mr. VLADECK. Good morning, Mr. Chairman. I, too, submitted a statement for the record, but rather than—

Mr. GEKAS. Without objection, we will include it in the record.

Mr. VLADECK. What I would like to do in my brief time before you this morning is to summarize four brief points. I recognize that I have a heavy burden of persuasion because the 10 witnesses that have preceded me have. All supported enthusiastically the amendments to the Regulatory Flexibility Act. I think they are unwise and I would like to explain why.

Let me start out by agreeing with the general sentiment that there is a problem here. The business community, particularly the small business community, has a legitimate beef with the regulatory agencies of the United States in the sense that too often their special needs are not taken into account during the rule-making process.

The problem is not one of ill will or of bad faith on the part of the regulators. Rather, it is that the communication devices that have grown up to allow agencies to create a dialog with the regulated community simply do not work for small businesses or for community groups or some of the organizations that I represent.

The principal vehicle by which agencies communicate their informational needs to the regulated public is the Federal Register. And it is simply too late in the day to think that that is an adequate vehicle for soliciting public input in the rulemaking process.

The rulemaking process these days is a very passive one and agencies do not have the resources nor the ability to engage in the kind of outreach that may be needed in order to get small business involved in helping frame an agency's regulations. And if the committee really wants to help solve this problem, which extends far beyond the small business community, one thing the committee ought to do is to see whether there are programs that could be put into place that will help create the dialog that is not taking place today.

But let me underscore that litigation is no solution to this problem. If you look at the average small business which has just been described, it does not have the resources to bring these kinds of lawsuits. I have litigated administrative law cases for the last 18 years. This is what I do. And the notion that the mom-and-pop grocery store or the small plumbing supply store in Indiana is going to be able to hire a lawyer and sue OSHA over its benzene standard if, in fact, OSHA failed to take into account the particular needs of small business, is silly. Those cases are incredibly expensive; they are incredibly technical; they are out of reach for small businesses.

The issues that are raised involve very complex and economic and scientific questions. And if the problem is communication, litigation after-the-fact is no way to solve it. What is worse is that this bill is a double-edged sword for the small business community because the way it is drafted, DuPont could easily sue and say, "hold

on for a minute, OSHA was much too sensitive to small business. OSHA has given them a competitive break."

The way the definitional section works in section 4003 of the act allows this statute now to become a tool to force even stricter regulation on small business. It is an unintended consequence, I am sure, but it is a problem.

Last, on the judicial review provision, let me underscore one thing. When you do administrative law cases like this, you try to avoid litigating on procedural issues like the ones raised in Reg Flex because if you win, all you get is a remand back to the agency with a direction to re-do the rule with better procedures. That is akin to kissing your cousin. Because you go back before the agency and the agency does a better job and ultimately readopts the rule in substantially the same form. You have wasted an enormous amount of resources litigating this case and yet you have achieved no substantive benefit.

Let me turn now to the judicial review provision. If there is to be judicial review, please fix this bill. What you have inadvertently done, I suspect, is wreak havoc on the Federal courts. If Reg Flex analyses are subject to judicial review, you must tell the courts in what court and when review may be obtained. The way this bill is drafted, if, for example, an agency initially certifies that there will not be a significant impact on small business, that decision is immediately judicially reviewable in a district court even before the rule is issued.

On the other hand, suppose the bill is not changed, the rule is issued, people rely on it, small businesses, large businesses invest money. There is a reliance interest. Yet 7 years down the road, or 2 years down the road, a small business says "hold on for a minute, we don't like this bill. We don't like this rule." Does it make any sense at all to let a Federal judge at that point, after people have invested time and money in complying with the bill, sweep it aside because the Reg Flex analysis prepared years before is somehow deficient?

I would say, no. That is why every time Congress authorizes judicial review of final agency rules, Congress by and large puts a time deadline in. You cannot allow this process to be open-ended. There was testimony earlier this morning about how the APA contains time limits. That is wrong. Judicial review provisions contain time limits not the APA.

The only general statute of limitation that runs against the Government is 6 years, and it would be a colossal mistake to let that statute of limitation govern when it comes to review of Reg Flex decisions.

My final point is on the "indirect effects" aspects of this bill. Five years ago or so there was a case challenging the failure of an agency to do a good job on a Reg Flex analysis before the D.C. circuit. And one of the arguments the small business made—and by the way, there has been judicial review of the adequacy of Reg Flex analyses for the last 10 years. The D.C. circuit has decided several. But in the course of this case, the argument was made the agency had failed by not appropriately analyzing the indirect effects. Judge Bork, who wrote the panel opinion in that case, said we are not going to throw the agency into that briar patch.

No one can define the term, "indirect effects." What regression is going to be acceptable? First tier effects, second tier effects, third tier effects, fourth tier effects? How far down the road will you force an agency to go? And unless you are prepared to define the term, you are saddling agencies with an undoable mandate in trying to assess what you mean and it is your word. It is Congress' word when you use the term, "indirect effects." You must define it.

I think there is much to be said about the concerns raised by small business in terms of the lack of dialog between administrative agencies and their special needs. But the proposals in title VI of the Job Creation Act are not a sensible way to fix that problem. Thank you very much.

[The prepared statement of Mr. Vladeck follows:]

PREPARED STATEMENT OF DAVID C. VLADECK, ESQ., PUBLIC CITIZEN LITIGATION GROUP

Mr. Chairman and members of the Committee, thank you for the opportunity to testify this morning on the Amendments to the Regulatory Flexibility Act, set forth as Title VI in the Job Creation and Wage Enhancement Act of 1995. These amendments are designed to reinforce the Regulatory Flexibility Act by subjecting agency decisions under the Act to judicial review and giving the Small Business Administration a greater role in asserting the interests of small businesses during the course of agency rulemaking.

I am a lawyer with Public Citizen Litigation Group, the legal arm of Public Citizen, Inc., a nationwide advocacy organization with over 100,000 members that has long been an active participant in the development of regulations before federal agencies. I am also a public member of the Administrative Conference of the United States.

Public Citizen has serious reservations about the wisdom of the proposals embodied in the proposed Regulatory Flexibility Amendments. As we read the proposed amendments, they seek to accomplish three main goals:

Repeal the current preclusion of judicial review set forth in 5 U.S.C. 611;

Require agencies to consider the "indirect effects of the rule" as well as its direct effects in determining whether a regulatory flexibility analysis is needed; and

Enlarge the role accorded to the Chief Counsel for Advocacy of the Small Business Administration ("SBA") by giving him or her the opportunity to comment on proposed rules prior to their publication in the Federal Register.

As I mentioned, Public Citizen has reservations about these proposals because we do not believe that they will solve the problem identified by their sponsors. In fact, we believe that the proposals will be counterproductive because they will further encumber an already overburdened regulatory process.

Before turning to the specific proposals, let me assure the Subcommittee that I am not unmindful of the problems faced by small business and the burdens that can be imposed on small business by federal regulation. Nor do I take issue with the idea, embodied in the Regulatory Flexibility Act, that special consideration should be given to small entities because they are more easily overlooked in the regulatory process than are their larger counterparts. Small entities generally cannot devote staff resources to follow regulatory developments and are less likely to have their interests represented by trade associations or lobbyists. Thus, it is no surprise that agencies sometimes fail to take into account the unique needs of small business entities when engaging in rulemaking. I would point out, however, that this problem extends not simply to small businesses, but to other groups that lack a cohesive institutional voice in the rulemaking process, including consumer and worker groups (only 11% of the private sector work force belongs to labor unions).

Although a problem may exist, the answer does not lie with H.R. 9. In our view, the problem stems not from an unwillingness of agencies to be sensitive to and respond to the special problems of small business. Rather, the problem is that agencies often lack an understanding of the special needs of the small business community and have no ready way to ascertain those needs.

In our view, the heart of the problem is the passive nature of the rulemaking process. Through advance notices of proposed rulemaking, requests for information,



and ultimately notices of proposed rulemaking—all published in the Federal Register—agencies make a concerted effort to solicit input from all sectors of the economy and the public. But if those comments are not forthcoming because small business owners are not avid readers of the Federal Register, there is little that agencies can do to obtain their input. Few agencies have the resources to conduct meaningful outreach to encourage small business groups to participate actively in agency rulemakings. At most, an agency will hold hearings in a couple of cities outside of Washington, D.C., or mail notices to trade publications which reach small businesses, but resource constraints make it impossible for agencies to do more.

Thus, we do not part company with the sponsors of H.R. 9 in terms of recognizing that the needs of small business at times go unaddressed by regulatory agencies. Where we part company is with the solutions that are embodied in Title VI of H.R. 9. In my view, each of the proposals set forth in Title VI would make little or no difference in the way that agencies address the concerns of small business while, at the same time, it is clear that each of these proposals would seriously hamper the ability of agencies to respond promptly to important societal needs.

To the extent that we can envision a way to ameliorate this dilemma, it would be to recognize that process-laden statutes like the Regulatory Flexibility Act cannot create a meaningful dialogue between agencies and those elements of society—including small business owners—who are most directly affected by regulation. The Act can only ensure that, once agencies have received input from small businesses, they take it into account in fashioning their regulations. To encourage more dialogue, Congress must give agencies the money and the mandate to ensure that small businesses are informed about regulatory initiatives and that their voices are heard. Nothing in H.R. 9 furthers that goal.

Let me now turn to each of the specific proposals contained in H.R. 9.

1. *Repeal Section 611's Limitations on Judicial Review.* The proposal to eliminate 5 U.S.C. 611 and therefore subject decisions under the Regulatory Flexibility Act to judicial review is unsound. Because Public Citizen generally favors judicial review provisions, I want to clearly set forth the reasons why we do not favor repeal of section 611.

Section 611 precludes review of virtually any action taken under the Regulatory Flexibility Act. For the purposes of this discussion, however, I assume that the Subcommittee is concerned about preclusion of review of only two types of agency action: *first*, an agency's certification that a rule would not have a significant economic effect on a substantial number of small entities, and hence no regulatory flexibility analysis need be prepared; and *second*, the actual contents of a final regulatory flexibility analysis complies with the Act.

While repeal of section 611 may be viewed as a way to restore to small business the rights of review that are available to others, that is not the case. With regard to the first point, existing case law makes clear that, notwithstanding section 611, small entities may challenge an agency's certification that a rule would not have a significant economic impact on small entities. *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985). Moreover, it is clear as a matter of basic administrative law that, if the impact of a rule on small entities is placed in issue during the public comment period, a court may review that issue even where an agency has certified that it need not prepare a regulatory flexibility analysis. *Thompson v. Clark*, 741 F.2d 401 (D.C. Cir. 1984). Consequently, in practical terms, small businesses now have the same rights of review as other parties.

As to the second point, regarding challenges to the contents of regulatory flexibility analyses, repealing section 611 would give small businesses a right to judicial review currently denied to other parties. Under Executive Order 12,866, agencies are required to prepare regulatory impact analyses for major rules, which include all rules likely to impose an annual effect on the economy of \$100 million or more (as was also the case under Executive Order 12,291). These regulatory analyses comprise the vast bulk of analyses prepared by agencies, apart from those required by the Regulatory Flexibility Act. Yet regulatory analyses prepared in accordance with the Executive Order are not judicially reviewable. See §10, Executive Order 12,866. Thus, the bar to judicial review in section 611 places small entities in precisely the same position as everyone else who might disagree with the contents of a regulatory analysis.

Moreover, it is wrong to assume that regulatory analyses—including both those prepared under the Act and those prepared pursuant to the Executive Order—do not play a role in judicial review of agency action. While there is a bar to judicial review of the analysis, section 611(b) makes clear that "[w]hen an action for judicial review of a rule is instituted, any regulatory flexibility analysis for such review shall constitute part of the whole record of agency action in connection with the review."

Accordingly, in the event that a small business entity can demonstrate that a regu-



latory flexibility analysis has not been prepared in accordance with the dictates of the Act and that the agency is therefore unable to provide substantive grounds supporting the rule as applied to small businesses, then a reviewing court would have grounds to invalidate the rule. *Mid-Tex Electric Cooperative*, 773 F.2d at 340-42; *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 637 (D.C. Cir 1983).

In the same vein, if the agency fails to respond to comments raising a clearly available alternative that would be less burdensome to small entities, that too would be grounds for invalidating the rule. *Id.*; See also Verkuil, *A Critical Guide to the Regulator Flexibility Act*, 1982 Duke L. J. 212, 263 n.282 (citing legislative history of the Regulatory Flexibility Act). For these reasons, it is wrong to assume that repealing 611 would level the playing field between small business entities and everyone else; it would not. Instead, it would give to small business rights in court that no one else has.

There is another important reason to retain section 611. Although I recognize that this effect is probably unintended, if this provision is repealed, Congress will nonetheless be seen as having *authorized* actions to challenge actions taken under sections 602 and 610 of the Act, concerning the regulatory agenda and periodic review of existing rules, or any procedural decisions under 608 and 609 of the Act. Whatever justifications there may be to permit substantive judicial review regarding an agency's certification or the contents of a regulatory flexibility analysis, they surely do *not* apply to these other procedural aspects of the Act. In fact, the consequences of such an action could be calamitous. For instance, opening the courthouse door to challenges to the adequacy of an agency's regulatory agenda would give business and other interest groups license to litigate an agency's priority setting—an activity that, with few exceptions, is generally immune from judicial review. There is no reason to condemn agencies to that fate. And this is just one of many adverse consequences that would follow repeal of section 611, which I cannot imagine were envisioned by H.R. 9's sponsors.

Relaxing restrictions on judicial review will be of little help to the small businesses that are the intended beneficiaries of this legislation. The impetus behind these amendments is to protect small businesses that do not have the economic resources to monitor agency rulemakings on a consistent basis. But if that is the case, it is unreasonable to suppose that they will be able to afford the judicial review offered by the proposed amendments. Have no illusions about this point: judicial review of agency action is neither inexpensive nor quick. The costs that inevitably are incurred in litigation far outstrip those associated with participating before an agency. If small businesses cannot afford that participation, they surely cannot afford litigation.

Rather, repeal of section 611 will create new opportunities for trade associations (with small business members) to challenge the regulatory flexibility analysis on every conceivable ground, as well to attack the rule on its merits. This consequence will not only force the agency to anticipate and address during the rulemaking all possible avenues of legal challenge—which will slow the rulemaking—but will also enmesh courts in satellite issues regarding, for example, the adequacy of the economic inquiry in the regulatory flexibility analysis.

Finally, the bill leaves unaddressed the critical question of timing. Nothing in the bill would forbid litigation challenging the adequacy of a regulatory flexibility analysis prior to the final issuance of the regulation. Unless that problem is rectified, this bill, if adopted, could easily subject agencies to multiple challenges, possibly in different jurisdictions and maybe even in different courts, to a single rule—one challenge to the adequacy of the regulatory flexibility analysis (which would be brought in district court, since no forum is specifically stated in the Act) and a second substantive challenge to the rule (which might well be in the court of appeals, depending on the jurisdictional provision the petitioner relies upon). That result is indefensible from a policy standpoint and needs to be addressed.

For these reasons, Public Citizen does not support the repeal of section 611.

2. *Requiring Agencies to Consider the Indirect Effects of a Rule in Preparing Regulatory Flexibility Analyses.* Since I am not an economist, I cannot authoritatively tell this Subcommittee that it would be impossible for agencies to consider the "indirect effects" of a rule. But I can tell you that this requirement would place enormous and unwarranted burdens on agencies, especially since no limitation whatsoever has been placed on this term by the proposed statutory language. The issue of whether an agency must consider "indirect effects" was discussed at some length in the *Mid-Tex Electric Cooperative* opinion authored by then-Circuit Judge Robert H. Bork. In rejecting a claim that the Regulatory Flexibility Act as currently drafted required an agency to assess indirect effects, Judge Bork stated that "Congress did not intend to require that every agency consider every indirect effect that any regulation might

have on small businesses in any stratum of the national economy. That is a very broad and ambitious agenda . . . 773 F.2d at 343.

Judge Bork's remarks counsel caution here. Requiring agencies to assess indirect costs in every case places an enormous burden that should not be imposed lightly. Not only would agencies have to analyze the second and third-tier effects of their rules, but, in order to conduct that analysis, agencies would have to greatly expand their information collection activities to ensure that they have adequate data on which to make these assessments. Paradoxically, requiring agencies to assess indirect costs would compel agencies to step up their information collection activities considerably, which is likely to impose *additional* burdens on small entities, not lessen existing burdens.

In terms of an agency's responsibilities under the Regulatory Flexibility Act, the burden imposed by this amendment would be manifest in two ways. First, agencies will have to try to take indirect effects into account when preparing initial and final regulatory flexibility analyses. That requirement may or may not be impossible; but it will surely require considerable additional labor by the agency. Second, and more problematic, the requirement will compel agencies to prepare regulatory flexibility analyses even where a proposed regulatory action would have only an indirect economic effect on small business. Under this formulation, it is a virtual certainty that the certification process spelled out in section 605(b) will be a dead letter because any agency action of any consequence will at least arguably have an indirect impact on small entities. Thus, agencies will be relegated to having to prepare a regulatory flexibility analysis for *every* rule, a consequence irreconcilable with section 605(b).

Moreover, such a requirement appears incompatible with other provisions of the Act. Most fundamentally, section 603 of the Act specifies the contents of regulatory flexibility analyses, but it speaks in terms of *direct* effects. See § 603(b)(3) (analysis need address only those small entities "to which the rule will apply"); § 603(b)(4) (analysis must contain "a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement."). Furthermore, section 605(a) contemplates that regulatory flexibility analyses will routinely be prepared in conjunction with the analyses required by the Executive Orders governing regulatory review. Yet, under the new Clinton Executive Order, the regulatory analyses required for OMB explicitly cover only the "*direct* cost both to government in administering the regulation and to businesses and others in complying with the regulation." Executive Order No. 12,866, § 6(a)(3)(C)(ii). There is no requirement that indirect costs be assessed. Accordingly, the new proposal would also render 605(a) a dead letter, since the analysis required under the Regulatory Flexibility Act would be far broader than that required by any other law or Executive Order. This result is an additional reason for rejecting this amendment.

3. *Providing SBA's Chief Counsel for Advocacy Advance Notice of Proposed Rules.* This aspect of the amendments would require each agency to provide the SBA's Chief Counsel for Advocacy 30 days advance notice of the publication of any notice of proposed rulemaking, and to furnish the SBA a copy of the proposed rule, a copy of the initial regulatory flexibility analysis, or a certification that an analysis is not required and an explanation for that determination. In the event that the Chief Counsel for Advocacy opposes the rule, the agency must publish both the Chief Counsel's opposition and the agency's response in its Federal Register notice accompanying the proposed rule.

We oppose this provision. For the past 12 years, Public Citizen, labor unions, environmental organizations, and other public interest groups have opposed giving any Executive Branch entity preferred access to pre-publication copies of proposed rules. We have done so both to avoid the needless delays that plague our administrative process and to avoid off-the-record interventions in agency rulemakings. Under Executive Order 12,291, agencies were required to submit *all* proposed rules to the Office of Management and Budget ("OMB") prior to publication, and we vigorously opposed that feature of the Executive Order. President Clinton understood the mischief such a regime can cause and dramatically curtailed that requirement in the new Executive Order governing regulatory review. The new Clinton Order requires that only a limited number of major rules be submitted to OMB for clearance prior to publication.

H.R. 9 marks a sharp departure from the theory of the new Executive Order, which is to streamline the regulatory process. Most observers recognize that the regulatory process is presently encrusted with procedural requirements which drain its vitality. As the non-partisan Administrative Conference of the United States has stressed, the rulemaking process is already ossified nearly to the point of being dysfunctional with multiple hurdles that agencies must clear in order to publish pro-



posed and final rules. Adding yet another layer of procedures, which will entail an additional 30 days' delay, is unwarranted.

Moreover, the proposal fails to demonstrate how this review would interact with OMB's review of major rules. As we read H.R. 9, submission of a pre-publication proposal to the SBA would have to await final OMB clearance, since only then would an agency be certain as to the substance of its proposal. But if that is the case, then H.R. 9 requires agencies to delay issuing a proposed rule that presumably is ready for publication for 30 days just to give the SBA an opportunity to register its opposition. Of course, SBA has that opportunity now as part of the normal notice and comment process. It also has the opportunity to raise its concerns with OMB, especially since the new Executive Order requires agencies to pay special attention to the needs of small businesses in rulemaking. Executive Order 12,866, §1(b)(11).

Moreover, if Congress wants to ensure that the Chief Counsel for Advocacy's views are taken into account, it should require agencies to respond to any opposition voiced by the Chief Counsel in writing and on the record. And if Congress so desires, it could also require that this exchange be published along with the text of the agency's final rule, which would ensure that the public is fully apprised of the Chief Counsel's views and that a reviewing court would have easy access to both the Chief Counsel's objections and the agency's response. But it is not sound policy to delay important regulatory initiatives an additional 30 days merely to give this interchange greater prominence.

I understand that the focus of these hearings is on Title VI of H.R. 9. But I also recognize that this Subcommittee has jurisdiction over Titles VII and VIII of H.R. 9, and I want to take this opportunity to offer brief comments on each of those provisions.

#### TITLE VII

Title VII of H.R. 9 calls for several dramatic amendments to the Administrative Procedure Act, including a far broader mandate for the preparation of Regulatory Impact Analyses (RIAs), a requirement that all notices of proposed rulemakings be preceded by an advance notice of intent to propose a rule, a requirement that an agency hold a hearing, if it is requested to do so by 100 or more people, and a requirement that OMB approve each RIA. We oppose each of these proposals for a variety of reasons, although there is one central reason to be skeptical about the wisdom of them all. As we have said, the regulatory process is already far too encumbered to work efficiently, and it is counterproductive to layer on additional procedures, as Title VII would do. Moreover, assessed individually, each of the proposals embodied in Title VII is flawed.

1. *Advance Notice.* The only purpose an advance notice of intent to regulate would serve is to delay the commencement of the rulemaking process. This provision cannot be defended on the grounds that it is needed to provide notice to the regulated community. For the past 15 years, each agency has had to publish in the Federal Register, on a semi-annual basis, its agenda, including contemplated but not yet initiated rulemakings. Thus, agencies already provide ample notice of their intention to regulate. Making matters worse, Title VII proposes that agencies publish draft RIAs at the time they give notice. Having to prepare a detailed RIA before even proposing a rule will squander scarce agency resources and require enormous commitments of time and money before an agency has even decided to issue a rule. This result is indefensibly bad policy.

2. *Expanded Use of RIAs.* This bill proposes to repeal by legislation President Clinton's Executive Order and replace it with a rigid, sweeping regulatory review process and RIA requirements far more onerous and far-reaching than in any prior Executive Order, including the one issued by President Reagan. This result too is bad policy. There are several aspects of the proposal that are of particular concern. First, the redefinition of "major rule" to include rules that affect more than 100 companies or impose compliance costs of \$1 million on a single company is far too broad and will sweep virtually every rule into the major rule category.

Second, the proposed RIA requirements themselves are far too onerous and agency compliance will be time-consuming and expensive for agencies to comply with. For example, in testimony yesterday, the FDA estimated that compliance with this requirement would cost \$100,000 per rule. In this era of concern for "unfunded mandates," Title VII is a classic unfunded, placing enormous financial burdens on agencies without helping the agencies pay for them. Moreover, the substantive standards embodied in the Act, especially §7004(c)(11) (that the "benefits outweigh the cost" of compliance) go well beyond those in the Reagan Executive Order and suggest that a new rule may not be adopted unless the agency can show that the benefits are greater than the costs. That mandate would collide head on with many statutes,

such as the Occupational Safety and Health Act, which forbid reliance on cost/benefit concerns when setting health standards.

Finally, Title VII is flawed because it leaves unaddressed three critical questions which have been answered by the prior Executive Orders which it would replace. For example: What about judicial review? No prior Executive Order permitted RIAs to be reviewable, but the absence of a provision precluding judicial review will likely be read by the courts as a green light to go ahead and review the adequacy of RIAs. That is a bad idea, for the reasons discussed above. In addition, what about exemptions from the RIA requirements for rules subject to judicial or statutory deadlines? This issue must be taken into account and resolved by Congress. And finally, what about openness? President Clinton's Executive Order ensures that the regulatory review process is an open one: Making the process transparent ought to be a goal that transcends party politics, especially since Title VII would give OMB unprecedented veto power over agency RIAs (and, consequently, over all agency rules).

3. *Mandatory Hearings.* Mandatory hearings are simply another layer of unnecessary procedure. Agencies have the discretion under existing law to hold hearings and often do. However, prescribing hearings on a universal basis makes little sense, since there are many rules that simply do not warrant the time or expense of a public hearing. Compounding the problem is the fact that the triggering event—requests from 100 commenters—is easy to manufacture, giving opponents of a rule an easy way to delay considerably the issuance of the rule.

4. *OMB Veto Power.* Entrusting OMB with veto power over agency RIAs is tantamount to anointing OMB as the Executive Branch's super-agency. In the past, OMB has abused its power under the Executive Orders, blocking rules on political grounds by demanding an unattainable level of perfection in RIAs. To give OMB such power on a silver platter is to create an enormous power center in the Executive Branch that, make no mistake, can be used to stifle regulatory initiatives that Congress has decreed. We urge this Committee to consider this provision very carefully.

## TITLE VIII

I will say little about this provision today, other than that it needs to be completely rethought. In its present form, Title VIII is nothing short of a Corporate Wrongdoers Protection Act. Subtitle A, which requires agencies to give advance notice of their investigatory efforts to the targets of their investigations, will totally thwart standard undercover and sting operations, making it impossible for EPA to catch midnight dumpers, for the FDA to expose swindlers selling counterfeit drugs, and for the Agriculture Department to apprehend cheats selling tainted meat. Congress should not come to the aid of corporate wrongdoers at the expense of the American people.

Subtitle B is equally bad. Although nominally intended to protect "whistle-blowers," it basically creates an easy way for corporations to sue, in the personal capacity, government inspectors. All one company needs to do is to tell an agency that it is being too lenient on the company's competitors, and the next time an agency cites the company for a violation, the company can sue the agency and its investigatory personnel claiming "inconsistent" or "disproportionate" enforcement of the law. The not too subtle message to government inspectors, of course, is enforce the law at your peril.

I want to thank the Subcommittee for this opportunity to share our views about H.R. 9. I would be glad to answer any questions that the members of the Subcommittee might have.

Mr. GEKAS. I thank you, Mr. Vladeck. The Chair yields itself 5 minutes to pursue some of the assertions made by members of the panel. Let's go backwards.

Mr. Vladeck, I think I lean toward your interpretation of the problems that we might be facing on the question of indirect, and I will ask the other panelists to comment on it also. I wonder if we could fix the matter in one of two ways: (1) By eliminating indirect altogether although I am not ready to do that, or (2) by adopting the suggested standards for the court to evaluate indirect. Do you prefer just eliminating indirect?

Mr. VLADECK. Well, let me respond in two ways. First, I think it would be preferable to eliminate that word in large measure be-



cause I think you will find it very difficult to define it in any reasonable way.

The other point I would make is that analysis of direct effects is already an enormously burdensome task. Agencies do it and it places a burden on regulated industry, because, in order to assess costs, the agency has to go out to the regulated community and get that data. It is very expensive to generate that data. And the further down the economic road you travel, the more burden is going to be placed on industry to generate that data. And it seems to me that at some point you have to say enough is enough.

So I would urge, first, that you simply excise the word, "indirect" effects. But if you are not going to do that, try to be as careful as you can in giving agencies and courts guidance as to what you mean by that term.

Mr. GEKAS. One other question. When you asserted that the small business community is, in effect, substituting a new measure of costs, namely attorney's fees and cost of litigation for the costs that have been imposed on them, as they see it, by the inflexible regulations that they are really not gaining anything. Do you agree?

If the business community, as it apparently has chosen to prefer judicial review and the attendant cost; that is, it will impose upon them with attorney's fees and the cost of litigation, knowing that future precedent will have been established in such a way that proportionately their costs of attorney's fees and litigation will be reduced because the regulators and small businesses will have notice about the outcome of a case. Don't you want to join them in taking the risk of the additional initial cost of attorney's fees in judicial review even though at the outset you may be correct they are just substituting one set of costs for another?

Mr. VLADECK. I think it is a hard question to answer.

Mr. GEKAS. That is why I posed it.

Mr. VLADECK. Let me answer as directly as I can. I disagree with the fundamental principle of your question. Anyone "aggrieved" currently can get judicial review of an arbitrary or simply senseless rule, and there have been lots of cases in which agencies have been held up short because they failed to adequately take into account the needs of small business. So if, in fact, the rule is arbitrary in the sense that it disproportionately burdens small business, you can get review of that today. You can go down to the courthouse, go up to the fifth floor, file your petition for review and get review on those grounds. Those kinds of cases are filed all the time.

This statute authorizes a very different kind of lawsuit. It authorizes a lawsuit to challenge a procedural requirement the agency must go through in formulating that rule. And what I am worried about is a lot of satellite litigation over procedures as opposed to the substantive end product. And it may well be that business has made a rational choice that it needs judicial review, but I, then, urge you to explore when you say "the business community," what segment? I think the small business community, the people who are the intended beneficiaries of this statute, the 20-, 30-, 40-employee firms who Congress really envisioned when this statute was passed, will not be able to take advantage of the judicial review provision.

Mr. GEKAS. Well, there is probably a difference of opinion on that. But we thank you for your testimony.

Mr. VLADECK. Thank you very much.

Mr. GEKAS. I ask Don to comment, as a lawyer and as a former legislator, on the question of the indirect. How do you—you feel we should allow that to remain in the proposed legislation, "shall consider both the direct and indirect effects of the rule?"

Mr. DORR. Yes, Mr. Chairman, I think it should be left in the legislation. It is possible that it could be better defined, but I would caution the panel, the subcommittee, to be very careful in that process.

In my extended remarks, there is a reference to action taken in the legislative process to deal with the term, "interpretive rules," when the RFA was initially enacted. There was a recognition that defined and an attempt was made to address the issue. But the attempt was ineffectual. And that interpretive rule terminology in the act has become a problem.

So in dealing with the terminology, "indirect," I caution that it is difficult to deal with that kind of nebulous term. What I would suggest as a remedy for that is to allow SBA to develop guidelines for the procedure that is to be followed by the agencies in the Federal Government in complying with the RFA. This is not, as I understand it, in title VI of the bill at this time. But that is possibly a way to address this issue.

If the SBA would adopt guidelines as to how to deal with it procedurally, they could deal with that issue of indirect as opposed to direct consequences in the process, it seems to me.

Mr. GEKAS. All right. Mr. Carty.

Mr. CARTY. Mr. Chairman, we would like to leave that language in there. We feel that this is something that the agencies should be sensitive to; that over time they will develop principles and analyses which will properly identify both direct and indirect costs and impact upon the small business community. But let me just say that we would like them to start considering direct impact upon the small business community. Let me read you a section—

Mr. GEKAS. We haven't even reached that.

Mr. CARTY. That is right. Section 609, the procedure for gathering comments. The agencies don't do this. No. 2, the publication of general notices of proposed rulemaking and publications likely to be obtained by small identities. That is that word again. Have you ever seen it? I haven't. The direct notification of interested small identities. I haven't seen that, either. The conduct of open conference or public hearings to cover the concerns of small businesses. I haven't seen that, either. If it happens, it is very, very rare.

Mr. GEKAS. The chairman yields itself an additional 2 minutes.

Mr. CARTY. So getting to the question of indirect or direct, I think that is a redherring. Let's get them to comply with the law. They are not doing it.

Mr. GEKAS. You said 9 percent of the cost of the gross domestic product—

Mr. CARTY. That is correct.

Mr. GEKAS [continuing]. Is taken up in the impact of the regulations.

Mr. CARTY. Yes.

Mr. GEKAS. Are you saying that our gross domestic product would be increased by 9 percent if none of this occurred. Is that what you are saying?

Mr. CARTY. No. I am just saying the impact is the equivalent of 9 percent of the gross domestic product.

Mr. GEKAS. I am not too—

Mr. CARTY. Nine percent of the gross domestic product is being spent on complying with government regulations.

Mr. GEKAS. All right. Thank you.

Mr. CARTY. Let me say, we are not saying let's do away with all regulation because—

Mr. GEKAS. No. No.

Mr. CARTY. Reasonable regulations and cost-effective regulations serve the public good and we are here to say that we support that. But what we want the Government to do is be more sensitive to the regulatory costs on the business community and especially the small business community and there are laws on the books and all we are saying is please comply. If you don't comply, give us a remedy.

Mr. GEKAS. Ms. McKernan, you mentioned—you put emphasis on it—in reviewing what the Clinton administration might have advocated was strong judicial review and yet we heard other testimony that, indeed, since that time that strength has been diluted a little bit in their proposals. Do you concur with that or do you think that they are in sync with our proposals here? Because I want to make it a bipartisan effort, if I can.

Ms. MCKERNAN. In fact, Mr. Chairman, I did not hear the testimony earlier so I apologize for that. But I—we are very hopeful that the administration will stick with the strong judicial review that they talked about last session. However, I did not hear what they said today, so if—if that is the case, we—we certainly hope that the Congress will work with them in order to achieve what they said was their goal last Congress.

Mr. GEKAS. I thank the panel. I now yield to the gentleman from Rhode Island.

Mr. REED. Thank you, Mr. Chairman. I also want to thank the panel for their excellent testimony. Mr. Vladeck, if you could elaborate on one of the points you raised, which was basically that under the present formulation of the bill someone could challenge the finding of no impact on small business immediately, even before the final rule—even before the publishing of the proposed regulations; is that correct?

Mr. VLADECK. I would assume so. Because at that point, agencies generally do not reassess that judgment and that may well be viewed by a reviewing court as a final agency action which is subject to judicial review. But even assuming it isn't at that time, at some point the agency will issue its certification.

And as I understand the drafting of the bill now and the intention underlying it, that determination would be judicially reviewable until whatever applicable statute of limitation, if there is one, ran out or unless a court found that the action was barred by laches, basically that the complainant knew and sat on his or her rights.



Mr. REED. So effectively, you could stop the further consideration of the substance of the rule by filing a suit at that point.

Mr. VLADECK. You may not be able to stop consideration of the rule, but a rational agency might say let's put everything on hold while the courts wend their way through determining whether our decision under regulatory flexibility was correct because if not, we are going to have to go back and do work. I am fearful of that, although ordinarily I am for judicial review.

I oppose judicial review here because it is so easy to use this provision to totally bollix up the rulemaking process, particularly where there is a need for swift regulatory action.

Mr. REED. My sense is that there is a strong consensus in the Congress that some judicial review should be imposed for the reasons that the panelists have indicated. My colleague, Mr. Skelton, stopped me in the hall and indicated that all of his efforts over the years are coming to naught because the agencies are cavalierly dismissing the requirements of the Regulatory Flexibility Act because they will not be challenged in court. But imposing judicial review does raise the set of issues that you have raised.

In crafting this judicial review, we have to be careful about its timing and also the effect that it will have on getting out reasonable efficient regulations. And I share some of your concerns.

Mr. VLADECK. Let me address a couple of those. The first is that it is imperative that rules not be reviewable until they are issued in final form. Congress ought to at least draw a floor below which review cannot be taken and it seems to me that, like any other administrative law decision that generally can't be reviewed until the rule is final, that finality ought to be one absolute precondition to judicial review. There are several others.

One is that there be finite limits set that govern review ability for other aspects of the rule. If everyone else has to get into court within a time certain, why should small business be excused of complying with rules that everyone else, citizens groups, environmentalists and everybody else has to comply with?

And the last thing I would urge is that you designate the right court. I assume that many courts, as a matter of clearing up their jurisdiction, draw them into whatever court had jurisdiction to review the final rule. But unless Congress gives clear guidance on this, you are going to leave the courts in a real quandary.

Mr. REED. Just a dependent comment. I also share the chairman's concern about "indirect effects", which is a term of art that goes even beyond costs. Costs alone are very difficult to measure and now we are asking agencies and ultimately judges to measure effects which could be many, many things.

And I am just wondering, speaking out loud, sitting in an agency or as a judge, what is an indirect effect? How far do we have to go back to calculate that? And I think we also have an obligation in this area to, if we are going to let the language stand, either to define it or if we find we can't define it, to let that language go. And I thank the panel for their very, very excellent testimony.

Mr. GEKAS. We acknowledge the presence of the ranking member of the full Judiciary, the gentleman from Michigan, Mr. Conyers. If the gentleman wishes to pose some questions, we will accord some latitude, as he has to me in the past.



Mr. CONYERS. Thank you very much and I am delighted, Mr. Chairman, delighted to visit here. And I did so today because I think this is an enormously important area that the Judiciary Committee is involving itself in. I want to thank all of the participants that are here and that will be coming forward while this is being examined. I know you scheduled, or intend to, a number of additional hearings on this subject and so I will be watching and joining you from time to time as often as I can.

The one question I wanted to raise, if Mr. Vladeck or anyone else would like to comment, is the relationship of the administration to this general subject, and Vice President Gore's National Performance Review activity as well.

Mr. GEKAS. If the gentleman would yield?

I wish to inform them that all of the witnesses thus far have in one way or another touched on the fact that the Vice President has advanced support for Reg Flex reform to include his version of, judicial review, so that, indeed, we are taking into consideration the administration's views. As I have pointed out, I personally—and I think others would join me—want to fashion a bipartisan product.

Mr. CONYERS. Thank you.

Mr. Vladeck, did you have a comment about this, about the Vice President's role and the administration's in this activity?

Mr. VLADECK. A very brief one. I think if you read the section of the National Performance Review that deals with this issue, it raises, perhaps, even more forcefully than I did, the need to reexamine the mechanisms by which agencies interact with regulated populations. And I think that a lot of the expression of concern that the committee and subcommittee has heard today and heard last year, is not an outgrowth of the inability for judicial review. It is just the fact that agencies are not performing outreach in a way that reaches enough of us, enough citizens.

There have been excellent programs. The EPA, for example, I think has done a terrific job in outreach, but other agencies, particularly because of resource constraints, may not be doing the job that we need them to be doing. And the reliance on the Federal Register as the agency's principal way of communicating information to the American public is probably outmoded. And if you look at National Performance Review, they are talking about computer bulletin boards and other kinds of access provisions that I think are really fascinating, and I hope that we will be able to see them implemented soon.

Mr. CONYERS. Well, I am concerned about creating a freestanding right to judicial review because it might create even frivolous litigation or it might be a way to stall progress, so I will be looking at this very carefully from that point of view and from the organization's point of view that you represent.

Did any of the other witnesses want to comment?

Mr. DORR. Mr. Chairman, Mr. Conyers, I wanted to comment really on one point. I believe it, was Mr. Thayer, who testified earlier, that the judicial review provision in this proposal will not create a spate of litigation. I agree.

The administration's attitude apparently is that the RFA ought to be complied with, but one of the representatives commented earlier that previous administrations, while they may have intended

for that to happen, were not able to generate that down into the bureaucracy. So that we ended up with a situation in which, in fact, the agencies have not complied with the RFA. So I believe and the U.S. Chamber believes, and all the witnesses that have testified today, I think, believe, with one exception, that the judicial review feature of this legislation is absolutely essential to bring compliance with this act about. I, frankly, don't expect to see any kind of a spate of lawsuits about it.

Mr. Thayer's comment with regard to the Equal Access to Justice Act, not presenting that kind of spate of litigation, I think is an accurate analogy.

Mr. CONYERS. Well, I hope this will help me sleep more comfortably in my bed at night, to know that lawyers won't take advantage of this. It goes against every bit of experience I have ever had, but maybe they won't, maybe something different will happen. But that is the area that I am looking at very carefully, because it always starts off like this, just a little item here and it won't be overly used, and then all of a sudden, the bar gets ahold of it and here we go. So I think that we ought to have that care, and I know that we will because we all know how our members of the bar are inclined to move on these kinds of things that they view as opportunities. But I thank you.

Mr. GEKAS. Yes, I would like to help you a little bit by reading one paragraph from the "National Performance Review" September 1993, which has now become part of the subject matter here, "In the most extreme cases, judicial review of RFA could lead to an initial flurry of lawsuits." We all have said that in one way or another. Once the first few cases are decided, however, the boundaries between acceptable and unacceptable agency behavior under RFA would become well known for agency attorneys and administrative law bar. After that, legal challenges could be expected to fall off dramatically.

This is just an opinion, but it sets the stage for the concerns of the gentleman from Michigan. We thank him for his participation.

Mr. CONYERS. Thank you very much.

Mr. GEKAS. We dismiss the panel with great sense of gratitude. Thank you.

Now, we invite Congressman DeLay to come to the forefront.

Congressman DeLay has been representing the general Houston area of Texas since 1984. He has been a coauthor of the Contract With America and one of its impelling forces. In this capacity, he now appears before us to take the next logical step between what has been heard this morning and what might be the next volatile subject in the whole issue—namely on title VIII. So we ask Tom to do what he can to elucidate us.

#### **STATEMENT OF HON. TOM DELAY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS**

Mr. DELAY. First let me say, Mr. Chairman, you look great sitting there. And I am very pleased to appear before you, and thank you for your graciousness in fitting your hearing into my time schedule. You were very kind to do so.

I thank you for this opportunity to testify in support of the Private Sector Whistleblower Protection Act. It is a bill I sponsored in

the last Congress, but which never got a hearing nor was considered in the House. So I am very pleased that you are holding these hearings.

This section of H.R. 9 is intended to protect individuals who decide to come forward with instances of regulatory abuse and to protect them from reprisal by the offending Federal agency.

I come to this issue after years of gathering information from average Americans on their experiences with the Federal Government as they go about their daily lives. I expect you already have heard from others this morning about how out of control the regulatory system is, and I am afraid I can only confirm that.

Regulations are so broad in their coverage and so complex, that it is common knowledge that it is nearly impossible ever to be in full compliance. The result, as James DeLong who is the author of an article in the American Enterprise stated, "Few people in any positions of responsibility, are free of an ominous sense of being subject to risks that they cannot assess or prevent, no matter how honestly they try."

In my view, this sense is entirely justified. Under the Clean Air Act, one can end up in jail for filling out a form incorrectly. And this is not just a random rare instance. This attention to minor and technical errors is actually deliberate government policy.

As a former EPA General Counsel wrote: "The current enforcement trend is to criminalize reporting and other paper violations which EPA assumes will help prevent more serious violations from occurring and increase the deterrent effect of the law." This is absurd.

As for other kinds of examples, an environmental engineer was criminally convicted of contaminating wetlands for moving two truckloads of dirt. Another man faced a grand jury because he stabbed a protected falcon with a pitch fork as it tried to kill a chicken in his front yard.

One company paid \$600,000, \$600,000 for failing to fill out a Federal form, even though it had complied with an identical State law. A rancher was charged with crimes for clearing brush from old irrigation ditches.

Now, the Federal Government is not supposed to instill fear in people's hearts when they imagine having to deal with it. Nor is it supposed to be viewed as an adversary. And yet, that is exactly what is happening in the real world.

Our Federal system has given great power to unelected, unaccountable regulators in literally hundreds of agencies. The power these regulators wield over American businesses, from issuing permits to levying fines, continues to expand. And people are at a loss as to how to deal with it.

In 1992, I started what I called the Regulatory Relay in which some of my—

Mr. GEKAS. Regulatory what?

Mr. DELAY. The Regulatory Relay. Some of my colleagues and I tried to highlight regulatory horror stories, detailing overzealous enforcement, overly burdensome rules, rules that failed to achieve their goals, and many more. And in this effort, we encountered an unmistakable reluctance from businesses and individuals to go on



record with the regulatory abuses to which they had been subjected.

Universally, the sentiment among businesses suffering from abusive regulatory practice was, "They may be hurting me now, but imagine what they could do if I got them angry." Agencies deny, of course, ever taking retaliatory actions against businesses that complain to Congress or the press, but the experiences of our constituents argue otherwise.

In fact, I had a conversation with a Heritage Foundation researcher who heard one Federal bureaucrat brag in an off-the-record interview that he had driven some 100 enterprises out of business with high fines.

The Private Sector Whistleblowers Protection Act will help hold agencies and bureaucrats accountable for abusing the power of their position. It will provide protection to their victims, ordinary citizens, businessmen, doctors, farmers, ranchers, developers, fishermen and many others. These are people that are afraid to speak out or fight against an unfair agency action because they fear retaliation from regulators.

Now, I realize the language in this section is not perfect and I would certainly support efforts of the subcommittee to improve it, and I am willing to work with you on it. However, I strongly believe in the concepts behind these provisions. As our constituents struggle daily to comply with an unending array of regulatory requirements, at the very least, they should feel free to speak openly about regulatory actions taken against them that they believe to be unfair.

Further, if Federal and State regulators are taking retaliatory action for such openness by our constituents, they ought to be held accountable. On November 8, 1994, the American people sent a message to Washington. They voted for a smaller, less intrusive government. An important step toward reaching this goal is assuring the American people that regulatory abuse will not be tolerated by this Congress.

I thank you, Mr. Chairman, for your consideration, and I urge your support and the support of the subcommittee on this provision of the Contract With America.

Mr. GEKAS. I thank the gentleman.

I will now yield to the gentleman from Rhode Island before I ask some questions.

Mr. REED. I just want to commend the gentleman for his testimony and his efforts, I know he has been quite active in this regard, and I look forward to working with him and the committee to see what we can do.

Thank you.

Mr. DELAY. Thank you, Mr. Reed.

I am looking forward to working with you.

Mr. GEKAS. What about the general concept, which you propose and which we are going to evaluate very carefully, regarding the level of confidentiality that would be accorded someone who wanted to blow the whistle. Are you saying that it should be open and public, should the protection against retaliation be put into place, or are you saying that we ought to encourage the whistleblower by of-



fering him or her some sense of confidentiality so that it won't become open and notorious, or is there a balance between the two?

Mr. DELAY. I think there is a little balance between the two. But I think the sanctions against agencies and individual bureaucrats in the bill against retaliation are so strong that it is a warning to the bureaucrats and the agencies that if they engage in retaliatory actions, they can be fined \$25,000 a day, and the individual bureaucrat can be fined \$25,000 a day.

Now, before you say that sounds abusive, right now the EPA can fine individuals \$25,000 a day for not filling out forms. There was a company in San Diego called Auto Supplies that was fined \$35,000 for the—by the EPA for failing to fill out a form in 1988 and 1989, a form R.

This company had to submit this form to the EPA to inform the public and community emergency response services if they used hazardous materials included on an agency list. The company does use brass, which contains a toxic component on the list called copper, for making circuit boards, but it doesn't change the content of the brass and, therefore, does not release toxic copper into the environment. So the owners of the company contested the fine with the EPA, and they object to the way the EPA enforces the Paperwork Act, yet the agency can charge up to \$25,000 a day for failure to file the form. Well, the way I feel about it, if the Government can fine individual Americans \$25,000 a day, they ought to be subjected to the same sort of fine coming from the other side.

Mr. GEKAS. Does the gentleman from Illinois want to ask any questions?

Mr. FLANAGAN. Yes, thank you.

Mr. GEKAS. The gentleman is yielded 5 minutes.

Mr. FLANAGAN. Thank you.

I want to thank Mr. DeLay for coming here today and sharing with us these horror stories, which I think many in my district and throughout the Nation could probably give you endless series of examples. I see in your testimony here that many of the small businesses and others who are affected by this say they would be hurting me now, imagine what they could do if I got them angry.

In comportment with the judicial review that would be incorporated into this and giving certain members of the regulatory agencies whistleblower powers to be able to stand forth with impunity and point out these horror stories. How will this burden, the regulatory system itself in an unnecessary way, where disgruntled employees would have an impact on the regulatory agency in such a way as to hinder what other good it may do?

Mr. DELAY. Well, I think certainly the critics are going to say—and as is usual, the argument is used that there will be a spate, I think, was used earlier, of litigation and attacks on the agencies. And I am sure there could be some abuses.

But the way I feel about it is there was—there is a spate of litigation created by just about every legislation that we pass, particularly the big ones. Right now, we have a spate of litigation on the Americans with Disabilities Act, on the Clean Air Act and many other agencies.

I just think it may have a spike and put an extra burden on the agencies, but again, we must remember that the agencies work for

the American people and if they are doing things that are oppressive on the American people, they should think twice about it. It is just a warning and human nature factor that we are imposing on the bureaucrats themselves to think twice about what they are doing. And so I guess you could say there could be a burden on the agencies but, quite frankly, that doesn't make me tear up.

Mr. FLANAGAN. I thank you for the remark, and I would agree with you. I asked you the question only to bring the information forward. I do believe the American people do need this sort of relief and judicial review. I believe, personally, this is probably the best way to provide it in comportment with this statute.

But as you said, there are those who will attack this, the numberers or bean-counters will stand forth and say this is going to cost a ton of money and be incredibly onerous and painful, and it may well be for a while. But it is a lot more painful because you moved two truckloads of dirt, and in my short time here, my encounters with the bureaucrats has been painfully unsuccessful. The excuse I hear more often than not is, you are going to make my job hard. We can't do that. We all work for the same employer. I think it is best when we all understand that and we try to do as good as we can.

Thank you.

Mr. DELAY. Thank you.

Mr. GEKAS. I thank the gentleman.

We now dismiss you so that you can return to other functions of the Contract With America.

Mr. DELAY. Thank you, Mr. Chairman.

Mr. REED. I should have tied him up some more.

Mr. GEKAS. Yes. Tie him up some more.

The next witness will be Ms. Jamie Gorelick, the Deputy Attorney General at the Department of Justice. She was previously the General Counsel at the Department of Defense. We will now entertain your views on this gigantic issue.

#### STATEMENT OF JAMIE GORELICK, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Ms. GORELICK. Mr. Chairman, and members of the subcommittee. Thank you very much.

In light of the time, I would like to submit my formal and lengthier statement for the record.

Mr. GEKAS. Without objection, it is so ordered.

Ms. GORELICK. I would like to thank you particularly, for allowing me to provide the Department of Justice's views on title VIII of H.R. 9, and I am pleased to be joined here with many people from the Department of Justice, including Robert Litt, Deputy Assistant Attorney General for the Criminal Division; William Esposito, Acting Assistant Director, FBI; and Paul Daly, Assistant Administrator, DEA.

We have shown up in force here, Mr. Chairman, because we are so concerned about the provisions of title VIII. Mr. Chairman, no one could disagree with the concerns that underlie this title. Citizens who are subjects of regulatory action should, of course, be protected from abuse by regulators. And citizens who criticize regu-

lators should be protected from reprisals against such criticism. We do not question those two laudatory—laudable goals.

But those protections are not the consequences that would flow from this title. To the contrary, the consequences that would result are ones that I am certain no member of this committee intends. Passage of this title, as written, would vastly expand the rights of criminal defendants, would greatly increase the flood of frivolous civil litigation; it would put unprecedented power in both—over both Federal and State agencies, in the hands of Federal judges. It would, in fact, deter whistleblowers from coming forward and it would subject Federal and State law enforcement officials—not bean-counters, law enforcement officials—to lawsuits by lawbreakers.

In short, the unintended consequence of passage of this title will be real damage to the cause of law enforcement. Ironically, passage of this title would run directly counter to many of the themes in the Contract With America that some members of this committee have signed. Unlike other provisions of the Contract, this one, as Mr. DeLay said, has never been the subject of public debate. It has never been the subject of scholarly analysis and most importantly, it has never been, before today, the subject of congressional hearings. But it runs counter to what I see in the contract as a message of anticrime, smaller, more efficient government, and concerns for unfunded mandates. As you will see, all of these goals are defeated by the title as it is written.

To be frank, in many places, the language is so obscure and ambiguous that I can't tell you what it really means. But what I can tell you is that there are judges and there will be defense lawyers, probably all defense lawyers, who will try to construe it in the way I will describe. And I guarantee you, you will not be happy with that construction.

Let's look at Subtitle A, the Citizens' Regulatory Bill of Rights. That imposes elaborate procedural requirements on Federal investigative or enforcement actions, both civil and criminal. It gives targets of such actions detailed rights upon the initiation of an inspection, an investigation or an official proceeding. Let's just talk about the consequences of giving these rights to targets of law enforcement.

The right to notification of an investigation's scope and purpose. A citizen who is sued or indicted by the Government should, of course, be advised of the scope and purpose of the action against him, and that is what the rules of criminal and civil procedure do in bills of particulars, discovery tools, et cetera. But this provision of title VIII pushes the notification back to a much earlier stage in the action, all the way to the initiation of the investigation.

And requiring notice at that early stage may damage our most effective law enforcement tools. The use of wiretaps, undercover agents, et cetera, are critical, critical to investigations of every kind of crime, from organized crime to narcotics trafficking to espionage. All of these tools depend on the target not knowing that an investigation is ongoing.

A requirement to advise a target of the purpose and scope of investigation at its outset would render these tools useless, and I am sorry that Mr. Barr isn't here, but you should ask him about the



Polar Cap investigation when he was U.S. attorney. That investigation involved the Medellin cartel. He used undercover agents to uncover drug smuggling and money laundering, and I will tell you that that investigation would never have borne fruit if this provision of the contract had been in place.

Similarly, the use of cooperating witnesses and criminal informants is critical to every kind of investigation, from violent crime to savings and loans investigations, from toxic pollution inquiries to securities and antitrust violations. But if you give the notice of scope and purpose required by this provision, that cannot help but give the target the kind of information necessary for him to determine who has been, as they say on the street, ratting him out. And far from helping whistleblowers, this provision is guaranteed to make whistleblowers lives much more difficult.

Search warrants, subpoenas, interviews: those are our bread and butter tools, they are not sophisticated law enforcement tools. Investigations are often very far along before we locate the buildings that must be searched, the documents that must be sought, the witnesses that must be interviewed. If targets are notified at the initiation of an investigation, such a notification will serve as an invitation to remove or destroy evidence to threaten or to bribe witnesses. And we see this. I can give you hundreds of examples daily of that kind of effort to obstruct our most important investigations.

Second, is the right to remain silent. The right against self-incrimination is enshrined in our fifth amendment and we believe in it. But it is a right with clear limits. It doesn't apply in civil cases in the same way that it does in criminal cases, because the consequences aren't as great. And it only applies if the conversation is incriminating. And it is not a right to remain silent for all reasons, only if the conversation is incriminating.

It only applies to self-incrimination. There is no right for me to remain silent in order to protect someone else. This provision of title VIII by contrast, would remove those limits altogether and tip the balance way against law enforcement.

Witnesses could no longer be required to testify in a grand jury, or in depositions, as to what they saw or what they heard another person say. Bank regulators could no longer demand information from those they regulate, information about the soundness of the institution or whether the institution has come under foreign control. Three-Mile Island would not have to supply information to safety—to safety regulators. It would have a corporate and personal right to remain silent. I cannot believe that is what is intended, but that is what the words say.

Third, is the right to an expanded *Miranda* warning. In *Miranda v. Arizona*, a 1966 case decided by the Supreme Court, it was required that criminal suspects be given certain warnings, including that their statements may be used against them. But *Miranda*, too, is a very limited right.

It doesn't apply in civil cases, and in criminal cases, it applies only when the individual is in custody. Why? Because that is when the risk of coercion that *Miranda* seeks to counteract is high.

As you know, there have been many efforts to limit the scope of *Miranda* over the years, many of them coming from the Republican Party. Indeed, the most recent example is section 507 of the Senate



crime bill, S. 3, which was introduced by Senator Dole on January 4. This provision is directly counter to the direction of S. 3.

Far from limiting *Miranda*, title VIII would vastly, vastly expand it. It would give targets the right to be warned that their statements can be used against them. And this would apply in civil as well as criminal investigations, and whether or not the individual is in custody and therefore being prevailed upon.

It would further require advising them whether they have a right to a warrant, which is nowhere found in *Miranda* or any other Supreme Court case. The results would be absurd. Just one example: before an undercover agent could accept a drug shipment or participate in any kind of a sting operation, he would have to warn his target that his statements can be used against him. I have many more statements like—examples like that in my extended remarks.

Fourth, the right to be present with an attorney or an accountant: Title VIII gives targets the right to be present at, "the inspection, investigation or proceeding," and the right, "to have an attorney or accountant present."

Now, this is a provision which is destined not to protect victims, witnesses, or whistleblowers, but to chill them. Which assault victim is willing to tell the Government the identity of his attacker, with the attacker and his defense lawyer present during that element of the investigation?

Which employee is going to tell government agents of fraud by his employer, with both his boss and his boss' lawyer present during the inspection and investigation or proceeding?

In fact, by actively discouraging whistleblowers, this bill strikes a damaging blow against the False Claims Act which Senator Grassley and others have championed for so long.

Again, I am sorry Mr. Barr isn't here to tell you about the *Rockwell* case in his district, a civil case. The witnesses, who were employees of Rockwell, I daresay, would not have provided the information that they did, had their employer been sitting in the room when they were asked questions by government investigators.

Now, in subtitle A, there is an exception for criminal investigations in certain circumstances. There is an exception when compliance would, "substantially or unreasonably impede a criminal investigation."

Unfortunately, we do not believe that this solves the problem. First, no one can tell you, and we have had a lot of discussion about lawyers and some about judges, no one can tell you how hundreds of district court judges will interpret the words "substantially or unreasonably impede."

What I can tell you is that there will be many who will read those words differently than I would, differently than our agents would, different than our prosecutors would, or I daresay, than you would.

And without a doubt, there will be many cases where our prosecutors and agents will conclude that the advance warning required by this title will damage their investigation and a judge will say it is not substantial. It is not unreasonable.

I can guarantee you with certainty, the one thing I can guarantee you is that every defense lawyer will file motions in every case to challenge any investigation that proceeds without these

warnings. I practiced law for 18 years, and most of that was in defense of complex civil and criminal cases. It would be malpractice, malpractice, not to file a motion where you have vague words like this, where those warnings were not given.

Second, criminal prosecution does not proceed in a vacuum. Many of our criminal cases—and this is what you have to appreciate—begin as civil or administrative investigations by Inspectors General or agency investigators, and others proceed parallel in criminal and civil tracks simultaneously. Because of the close relationship between our civil and criminal enforcement programs, if you impose the requirements of title VIII on civil cases, that could well make the subsequent civil and criminal prosecutions impossible.

If you—if you feel that I am going on too long, please stop me. You can tell we are most exercised about this and if—and I will rest on the record if you need to.

Mr. GEKAS. No. No. We want you to proceed.

Ms. GORELICK. This is a truncated version of my long statement. Third, you need to know that criminal prosecution—

Mr. GEKAS. I would ask the lady to suspend only for the purpose of accommodating the gentleman from Rhode Island who has to leave but wants to pose some questions before you finish your statement.

Ms. GORELICK. Absolutely.

Mr. REED. Thank you very much for your excellent testimony. And I share your concern about the vague wording of this title. Here, as I read the first part of the section Aldrich Ames would have had to be notified of the scope of the investigation, certainly it wasn't, at that point, a criminal investigation. He would have been notified.

Ms. GORELICK. Before we went in to search his computer, we would have had to tell him we were coming.

Mr. REED. As I look at whistleblower action, it goes beyond the highly notorious cases. I am thinking, as both a Congressman and as an Army officer, if I received a letter from private first class at Fort Bragg that said his first sergeant was arbitrary, could that be construed as colorably giving rise to all these rights and anything against him with retaliation; is that too farfetched?

Ms. GORELICK. Again, if you believe that you are likely to be the subject of a regulatory inquiry, first thing you would do is write a letter to whatever the regulatory agency is, let's just call it IRS, and you would say, I think your enforcement of the tax laws is arbitrary. And then you have made a charge, and as soon as the IRS then comes in, you can say it is in retaliation.

Now, I am not saying that there are not justifiable complaints about regulators. But this is a sledgehammer approach which will have many unintended consequences for law enforcement.

Mr. REED. Let me ask you to comment on the effects on the States and State officials.

Ms. GORELICK. This is an unfunded mandate. This affects all State regulators who have any role in effectuating a Federal regulatory program, and as you all know, there were many. This will make them vulnerable to the same kinds of procedures and will let

Federal judges oversee State regulatory decisionmaking and enforcement decisionmaking.

Mr. REED. The premise for this whole proposal is that it will somehow ease the burden on business. Is that an outcome?

Ms. GORELICK. I do not believe it is. I represented small and large businesses for 18 years, and I can tell you that what they mostly want is certainty. They want to understand what the rules are, and then they want them fairly applied. And that is what you heard from the earlier panel. And we certainly agree that regulations should be clear so people have notice of them.

But to have clear regulations and then not enforce them, or have tremendous deterrents to enforcing them, leaves the complying business at a relative disadvantage to the noncompliant business, and leaves business not knowing what the rules really are, if they are not really enforced. I think that this title is not good for small business. I would not advocate it if I were a small business person.

Mr. REED. Thank you.

I thank the chairman for his tolerance and his patience.

Thank you very much.

Mr. GEKAS. By all means. The lady may proceed.

Ms. GORELICK. Thank you, Mr. Chairman, and thank you, Mr. Reed.

The last point I wanted to make before turning to the whistleblower provision has to do with the notion that you can solve the problem here by carving out the criminal enforcement program. As I have just explained, much of what we do in the criminal area flows from what we do in the regulatory area.

As Attorney General Meese said in 1986, an integral part of our effort to combat waste and fraud and abuse is the pursuit of civil recoveries from those who defraud the United States. Civil actions are so central to what we do in the health care area, in antitrust, in defense procurement fraud, and in securities fraud, and again, I can tell you from my own personal experience, the harder you make it to enforce administrative and civil remedies, the more incentive there is to criminalize those cases.

We saw that happen in the 1980's, the regulatory resources went down, while the criminal prosecution of some regulatory offenses went up. And I really caution you against that sort of line-drawing. We believe the same principles apply to both civil and criminal law enforcement. The same investigative tools are used in both.

Let me turn for a moment to the private sector whistleblower protection. No one could disagree that protecting our citizens from reprisal by government regulators is a worthy goal. Let me be clear about that. But this subtitle also has a host of unintended consequences that no one in this room, I daresay could possibly intend.

It will create a flood tide of civil litigation. It will greatly expand Federal judges' authority over both Federal and State agencies. And it will penalize career civil servants personally for actions that they take in good faith. These are the consequences of many of the key provisions of the title, and let me just very briefly hit on them. I have a much longer discussion of them in my prepared remarks.

First, the rights under this subtitle depend on the motive of the agency official: That is, whether the disclosure by the regulated party was a contributing factor to the agency action. And making



cases turn on the motive of an official is going to punish society because the constable blundered. And even if you find a blunder, in most cases what you are going to end up with is a litigation about what motivated the underlying inquiry.

The example I gave before about the tax protester: The tax protester is going to write in and say you were out to get me. Then, you have an inquiry of whether the IRS was simply doing its enforcement job, or was coming in because the person wrote a letter. And you are going to have a litigation and people making memos of why they are taking individual steps. It will really have, I think, many unintended consequences.

It also makes the assertion of a prohibited regulatory practice a defense to an agency's attempt to enforce the law or regulation. And so it will not just be used by the innocent, but more importantly, by the sophisticated lawbreaker who wants to stop the imposition of a justified penalty. And that person will create a litigation defense by doing nothing more than asserting that the agency is acting arbitrarily.

Third, the lawbreaker doesn't need to wait until the agency begins an enforcement action, but can file its own action in advance to restrain the agency from acting. The purpose of the current rule that bars that is to prevent unnecessary and duplicative litigation. This subtitle encourages that.

Fourth, as I noted before, it gives the regulated party the unprecedented ability to haul State agencies and officials into Federal court.

And finally, the imposition of \$25,000 a day in fines on a State or Federal employee: Given the vague prohibitions of this proposed statute and its focus on what as everyone knows is the very ephemeral concept of motive as a key to liability, this cannot help but deter career public servants from acting in good faith as they believe the public welfare requires. No one is going to act without an eye on their own pocketbook. I mean, I have personal liability insurance that I pay for the actions I take as Deputy Attorney General, because of just the actions that could be filed against me now.

Louis Freeh, the Director of the FBI, has 221 filed against him, and he has hardly been here a year—and that is without title VIII. Bear in mind, that Attorney General Thornburgh in 1988 urged passage of, and this Congress did pass, the Federal Employees Liability Reform and Tort Compensation Act, which substituted the United States for the Federal employee in these actions for just this reason. And to go back from that, I think, would undermine law enforcement, as it has been supported by Republicans and Democrats for an awfully long time.

I think that passage of title VIII would vastly expand the rights of criminal defendants, greatly increase the flood of frivolous civil litigation, put unprecedented power in Federal courts, over State and Federal agencies, deter true whistleblowers from coming forward, and subject law enforcement to lawsuits by lawbreakers.

I know that the members of this subcommittee don't intend those consequences, and for those reasons, I urge you to reject the provisions of title VIII.

Thank you.

[The prepared statement of Ms. Gorelick follows:]



PREPARED STATEMENT OF JAMIE GORELICK, DEPUTY ATTORNEY GENERAL,  
DEPARTMENT OF JUSTICE

INTRODUCTION

Mr. Chairman and Members of the Subcommittee: Thank you for the opportunity to provide the Department's views on Title VIII of H.R. 9, the "Job Creation and Wage Enhancement Act of 1995." I am pleased to be joined by Robert Litt, Deputy Assistant Attorney General for the Criminal Division; William Esposito, Acting Assistant Director, FBI; and Paul Daly, Assistant Administrator, DEA.

Mr. Chairman: No one could disagree with the concerns that underlie this Title. Citizens who are subjects of regulatory action should be protected from abuse by regulators, and citizens who criticize regulators should be protected from reprisals for such criticism.

But those protections are not the consequences that would flow from passage of this Title. To the contrary, the consequences that will result will be ones I am certain no member of this Subcommittee intends. Passage of this Title will:

- vastly expand the rights of criminal defendants
- greatly increase the flood of frivolous civil litigation
- put unprecedented power over both federal and state agencies in the hands of federal judges
- deter whistleblowers from coming forward

subject federal and state law enforcement officials to lawsuits by lawbreakers

In short, the unintended consequence of passing this Title will be real damage to the cause of law enforcement. And, ironically, passage of this Title would run directly counter to many of the themes of the Contract With America that some Members of this Subcommittee have signed. Unlike many other provisions of the Contract, this one has never before been the subject of public debate, the subject of scholarly analysis, or the subject of congressional hearings. To be frank, in many places its language is so obscure and ambiguous that I cannot tell you what it really means. What I can tell you is how many judges, and all defense lawyers, will try to construe it. You will not be happy with that construction.

SUBTITLE A—"CITIZENS' REGULATORY BILL OF RIGHTS"

Subtitle A of Title VIII, the "Citizens' Regulatory Bill of Rights," imposes elaborate procedural requirements on federal "investigative or enforcement action[s]," both civil and criminal. It gives targets of such actions detailed rights upon the "initiation of an inspection, investigation, or other official proceeding." Those rights include, among others, the right:

- to be informed as to the scope and purpose of the agency action
- to remain silent
- to be advised that statements can be used against them, and whether they have a right to a warrant
- to be present at the inspection, investigation or proceeding with an attorney or accountant

1. *The Right to Notification of the Investigation's Scope and Purpose.* Citizens who are sued or indicted by the government should, of course, be advised of the scope and purpose of the action against them. For that reason, the rules of criminal and civil procedure provide for bills of particulars and other discovery tools to elucidate such matters. This provision of Title VIII, however, pushes such notification back to a far earlier stage of the action—all the way to the date of the initiation of the investigation. Requiring notice at that stage would damage our most effective law enforcement tools.

The use of wiretaps and undercover agents is critical to investigations of every kind of crime from organized crime, to narcotics trafficking, to espionage. All of these tools depend upon the target of the investigation not knowing that an investigation is ongoing. The advance notification required by this provision would render these tools useless.

The use of cooperating citizen witnesses and criminal informants is critical to every kind of investigation, from violent crime to savings & loan fraud, from toxic pollution to securities and antitrust violations. But the notice of scope and purpose required by this provision cannot help but give the target the kind of information necessary to determine who has been "ratting him out," as they say on the street. Far from helping whistleblowers, this provision is guaranteed to make their lives more difficult, and more dangerous.

Increasingly, law enforcement uses undercover "sting" operations to do everything from uncovering stolen car rings, to undermining money laundering operations, to luring fugitives into international waters for their capture. Needless

to say, a requirement to advise targets of the "purpose and scope" of such investigations would render these tactics impossible.

Search warrants, subpoenas and interviews are not sophisticated law enforcement tools. They are the bread-and-butter of law enforcement—the way in which necessary evidence is obtained before it can be removed or destroyed. But investigations are often far along before investigators have located the buildings that must be searched, the documents that must be sought, and the witnesses who must be interviewed. If targets must be notified at the initiation of an investigation—long before the physical and testimonial evidence has been secured or even identified—such notification will serve as an invitation to remove or destroy evidence, and to threaten or bribe witnesses.

The rule of federal criminal procedure that protects the secrecy of grand jury proceedings, and the provision of the False Claims Act that requires the sealing of private *qui tam* actions, are both intended to do the same thing: to permit the government to investigate a matter without tipping off the lawbreaker, without giving him a chance to concoct a false story in advance, and without giving him a chance to hide the evidence or corrupt the witnesses. The proposed provision of Title VIII could trump these key provisions of the criminal and civil law.

2. *The Right to Remain Silent.* The right against self-incrimination is enshrined in the Fifth Amendment to the Constitution. It is a right that is central to our concept of individual freedom, but nonetheless a right that renders law enforcement more difficult. For that reason, it is a right with clear limits. It does not apply in civil cases—where the consequences are not as great. It applies only if the conversation would be *incriminating*; it is not a right to remain silent for any other reason. And it applies only to *self* incrimination—there is no right to remain silent in order to protect someone else. This provision of Title VIII by contrast, would remove these limits and tip the balance against law enforcement. These are some of the consequences:

Bank regulators would no longer be able to demand information from those they regulate—information about the soundness of the institution, or whether it has come under foreign control.

The SEC could no longer require stock brokers to divulge their trades, in order to determine the existence of insider trading.

Witnesses could no longer be required to testify in the grand jury, or in depositions, as to what they saw or heard another person do or say.

3. *The Right to Expanded Miranda Warnings.* In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court required that criminal suspects be given certain warnings, including a warning that their statements may be used against them. But *Miranda*, too, is a limited right. It does not apply to civil cases, and in criminal cases applies only when the individual is in custody—because only then is there the risk of coercion that *Miranda* seeks to counteract. As you know, there have been numerous efforts to limit the scope of *Miranda* over the years. Indeed, the most recent example is Section 507 of the Senate Crime Bill, S. 3, which was introduced by Senator Dole on January 4. But far from limiting *Miranda*, Title VIII would vastly expand it. It would give targets the right to be warned that their statements can be used against them. The right would apply in civil as well as criminal investigations, and would apply whether or not the individual is in custody. And it would further require advising them whether they have a right to a warrant—a requirement not contained in *Miranda* or any other Supreme Court case. The results are absurd, but appear required on the face of the statute:

Before an undercover agent could accept a drug shipment, he would have to warn his target that his statements could be used against him.

Routine, voluntary, non-custodial interviews would be transformed into formal proceedings, and the ability of agents to obtain statements in such circumstances hampered.

Consensual, but warrantless, drug searches at airports, bus and train stations—now a staple of our drug interdiction efforts—would be made substantially more difficult.

4. *The Right to be Present With an Attorney or Accountant.* Title VIII gives targets the right to be present at the "inspection, investigation, or proceeding," and the right "to have an attorney or accountant" present. This is a provision destined not to protect victims, witnesses or whistleblowers, but to chill them.

Which assault victim will be willing to tell government agents the identity of his attacker—with the attacker, and his defense lawyer, present during the "investigation"? Certainly neither of the following:

the victim of spousal abuse who wants protection from her husband.

the victim of gang violence who wants to stop the killing.

And which employee will be willing to tell government agents of fraud by his employer—with his boss and his boss' lawyer, present during every "inspection, investigation [and] proceeding?" Certainly none of the following:

- the defense industry employee who wants to tell visiting Defense Contract Audit Agency auditors or the Inspector General about procurement fraud by his employer.

- the bank clerk who wants to tell the FDIC examiner about fraudulent book-keeping entries.

- the chemical plant worker who wants to warn EPA investigators about the dumping of toxic waste.

- the factory worker who wants to tell the OSHA inspector of dangerous conditions in the factory.

Indeed, by actively discouraging whistleblowers, this bill strikes a damaging blow against the False Claims Act that Senator Grassley and others have championed for so long.

5. *Subtitle A's Exception for Criminal Investigations.* The Subtitle does try to limit the damage to law enforcement I have just described, by carving out an exception where compliance with its requirements would "substantially or unreasonably impede a criminal investigation." Unfortunately, that exception simply will not solve the problem.

First, no one can tell you, today, how hundreds of district judges will interpret the words "substantially or unreasonably impede." What I can tell you, however, is that there will be many who will read them differently than I would, or than our agents and prosecutors would, or than any of you would. Without doubt, there will be many many cases where our prosecutors and agents will conclude that the advance warning required by this Title will damage their investigations—but where the judge will say the damage is not "substantial" or "unreasonable." And I can guarantee with certainty that almost every defense lawyer will file motions in almost every case to challenge any investigation that proceeded without those warnings. As a consequence, our prosecutors will end up spending more time defending those motions than they will prosecuting the bad guys.

Second, criminal prosecution does not proceed in a vacuum. Many of our criminal cases begin as civil or administrative investigations by Inspectors General or agency investigators. Many others proceed on criminal and civil tracks simultaneously. Because of the close relationship between our criminal and civil enforcement programs, the imposition of the requirements of this Title in civil cases could well make subsequent or parallel criminal prosecutions impossible. It will be cold comfort to our FBI agents to learn that they can keep their criminal investigation secret, but that the Inspector General has already disclosed the preceding administrative investigation of the same conduct.

Third, criminal prosecution is not all there is to our enforcement program. As Attorney General Meese said in 1986, an "integral part" of our effort to combat waste, fraud and abuse "is the pursuit of civil recoveries from those who defraud the United States." Civil actions are central to our enforcement program in such areas as health care fraud, antitrust, defense procurement fraud, and securities fraud. Investigations in these areas use many of the investigative tools described above, tools that would be rendered ineffective by too-early notification of the existence of the investigation, by decreeing a right to remain silent, by mandating expanded *Miranda* rights in civil cases, and by guaranteeing the target's and lawyer's presence at every stage of the investigation.

As I finish my discussion of Subtitle A, let me try to put it in a perspective that everyone can understand. The provisions of this Subtitle would require the RTC to inform the target of a savings & loan investigation as to the scope and purpose of that investigation. And the RTC could not even delay that notification until it decided whether to make a criminal referral to the Justice Department. Rather, it would have to advise the target as soon as its administrative investigation was initiated. Is that the result this Subcommittee intends?

#### SUBTITLE B—PRIVATE SECTOR WHISTLEBLOWER'S PROTECTION

Subtitle B is called the "Private Sector Whistleblowers' Protection Act." The introductory section of the Subtitle indicates that its purpose is to protect regulated persons from reprisals by agencies for disclosing certain kinds of information. The kinds of disclosures covered by the provision include a statement by the person that he believes an agency has acted arbitrarily, is wasting or misallocating its resources, is engaging in inconsistent enforcement, or has endangered public health or safety. When the disclosure of such information is "a contributing factor" in the decision to take agency action, the action is deemed a "prohibited regulatory practice."



No one could disagree that protecting our citizens from "reprisal" by government regulators is a worthy goal. But this Subtitle, too, has a host of consequences that no one in this room could possibly intend. It will create a flood tide of civil litigation; it will greatly expand federal judges' authority over both federal agencies and the states; and it may penalize career civil servants personally for actions they take in a good faith belief that they are required by law. These are the consequences of many key provisions of the Subtitle.

First, rights under this Subtitle depend upon the motive of the agency official—that is, whether the disclosure by the regulated party was "a contributing factor" in the decision to take agency action. Under current administrative law, by contrast, the motive of the agency official ordinarily is not relevant. That is the rule because motive is so difficult to discern that litigation over it would create an enormous litigation sideshow. It is also the rule because letting federal judges plumb the "motive" of agency officials would give them virtually unreviewable authority over Executive Branch action. And it is the rule because making cases turn on the motives of officials could well "punish society because the constable blundered." The Subtitle, for example, immunizes a regulated party from penalties and fines (but not from compliance) where the disclosure was a "contributing factor" to the decision to take agency action—even if the agency establishes that the party did in fact break the law.

Second, the Subtitle makes the assertion of a prohibited regulatory practice a defense to an agency's attempt to enforce a law or regulation. This provision will be used not only by the innocent, but by lawbreakers trying to stop the imposition of justified penalties. When such a party believes regulation to be imminent, it can create a litigable defense by doing nothing more than asserting that the agency is acting arbitrarily, or is wasting agency resources by focusing on the lawbreaker, or is engaging in inconsistent enforcement in the same manner. That assertion then enables the defendant to mire enforcement actions in discovery and litigation about the subjective motivations of the agency and its employees, rather than focusing on whether the defendant violated the law.

Third, under the Subtitle, the lawbreaker need not wait to litigate until the agency actually begins enforcement of a regulation, but rather can file its own action to restrain the agency. Under current administrative law, a party ordinarily must wait until the agency acts, and then defend itself. The purpose of the current rule is to prevent unnecessary and vexatious litigation in the federal courts. This Subtitle encourages such litigation.

Fourth, the Subtitle gives regulated parties the ability to haul state agencies and officials into federal court as well. Under current law, federal courts have almost no jurisdiction to hear challenges to actions by state agencies (except where the challenge states a violation of the U.S. Constitution). Subtitle B, however, applies to any state agency that "exercise authority under Federal law," or "that exercises authority under State law establishing a program approved by a Federal agency as a substitute for or supplement to a program established by Federal law." It thus would permit federal courts to review the actions and motives of state health, environment and welfare agencies and officials to an extent never before permitted.

Fifth, the Subtitle's language is so vague, and so ambiguous, that it will spawn years of litigation to determine its meaning. Are criminal prosecutions considered "regulatory actions" under the Subtitle, and therefore subject to the defenses and injunctive actions it authorizes? What if they arise out of administrative investigations found to have been initiated, in part, because of practices prohibited by the Subtitle?

What does the statute mean when it prohibits agency actions based on disclosures by the regulated person, "or by any other person?" What if a true whistleblower, an employee of a nuclear power plant, complains to the press that the NRC has "endanger[ed] public safety" by failing to stop the plant from releasing radioactive waste into a stream. If on the basis of that disclosure the NRC thereafter does enjoin the plant—has it engaged in a "prohibited regulatory practice"?

Sixth and finally, the Subtitle imposes personal liability on federal and state employees found to have engaged in the practices it prohibits—in amounts up to \$25,000 per day. Given the vague prohibitions of the statute, and its focus on the ephemeral concept of motive as the key to liability, this cannot help but deter career public servants from acting in good faith as they believe the public welfare requires. No one could act in such circumstances without one eye on the possible risk to her personal pocketbook. Indeed, it is precisely for that reason that in 1988, Attorney General Thornburgh urged passage of, and Congress did in fact pass, the Federal Employees Liability Reform and Tort Compensation Act—which substituted the United States as defendant instead of individual federal employees in tort suits.



## CONCLUSION

Passing Title VIII of H.R. 9 would vastly expand the rights of criminal defendants; greatly increase the flood of frivolous civil litigation; put unprecedented power over federal and state agencies in the hands of federal judges; deter true whistleblowers from coming forward; and subject federal and state law enforcement officials to lawsuits by lawbreakers. I know that the Members of this Subcommittee do not intend these consequences to come to pass. For that reason, I urge you to reject the provisions of Title VIII.

Mr. GEKAS. I thank the lady for her testimony.

The Chair yields itself 5 minutes to begin the inquiry.

I am not startled by the implication of your testimony that you would like to get rid of this altogether. And with respect to your criticism of subtitle A, you are not even willing, if we change the language of the unreasonably—substantially or unreasonably, you are not even willing, are you, to allow some of this to stand if we eliminated criminal investigations altogether?

Ms. GORELICK. For the reasons I explained, I think that merely excising cases that begin as criminal investigations would not be sufficient given how many start off as agency matters or as agency inquiries or as parallel civil and criminal investigations.

Mr. GEKAS. You mean, if we excised criminal investigations—

Ms. GORELICK. That is if you excise. You see the provision would then say that at the outset of a noncriminal investigative or civil inquiry, you need to give the right to remain silent and the other rights that are listed. As you know, we would. Let me just give you an example. RTC is a civil investigative agency. It begins in an administrative proceeding. Now, do you want the RTC to have to tell the target of an investigation, the scope of the investigation, have him—have the right not to comply with the investigation, not to say anything, have the employees of the entity not say anything, not deliver any documents, not respond in any way? Do you want to put that person on notice. Do you want to give him the right to have his attorney present?

Mr. GEKAS. Assuming that we did want that, how would that harm the criminal side?

Ms. GORELICK. Because in 9 months, there is a criminal referral. The case—at the end of line there, it can go administratively, it can go civil or it can go criminal. A lot of what we do, as you know—

Mr. GEKAS. What if we would after all of these are in place—

Ms. GORELICK. Because it is too late. What I am trying to explain is that on day one, it is an administrative proceeding and all these rights kick in. We don't know it is criminal until 9 months from now, at the end of that line, and all the harm that we—

Mr. GEKAS. But that happens now does it not—

Ms. GORELICK. No, it does not happen now. In fact, you may recall hearings about notifying subjects of RTC investigations—

Mr. GEKAS. Yes.

Ms. GORELICK [continuing]. In advance of a criminal referral. I will tell you that it would undermine criminal and civil law enforcement to have to provide the notice at the outset—the notice and all of these rights at the outset of a civil or administrative proceeding, which, at some point down the line, could become criminal and often turns into a criminal investigation. Yes, it would hurt the criminal law enforcement and it would hurt civil law enforcement.

Mr. GEKAS. Well, I want to assert so that you will sleep well to-night, that I will not support anything that would put any kind of blemish on a pure criminal investigation.

Ms. GORELICK. I appreciate that.

Mr. GEKAS. And to the extent that subtitle A, in my judgment, would do that. I would not support maintenance of this subtitle. But I am not content yet that just excising the criminal investigation from its purview won't serve that purpose. I am not yet ready to acknowledge that.

Ms. GORELICK. You know what I would be happy to do, Mr. Chairman? I appreciate your strong anticrime record, and therefore it is not a surprise to me that this argument has resonance with you. What I would like to do is come in and give you real-life examples of why that fix does not serve your goal.

Mr. GEKAS. And then I am less convinced about subtitle B, that is, you even seem to feel that is counterproductive in the ways that you have outlined.

Ms. GORELICK. Yes, sir.

Mr. GEKAS. I am not as totally convinced about that as I am about your first assertions as to the criminal investigations in subtitle A. But your testimony is invaluable.

Ms. GORELICK. Thank you.

Mr. GEKAS. And I am telling you now, it is going to affect the final language of these subtitles. I could be overruled on what I am saying, but at least my initiative will be toward that goal.

Ms. GORELICK. I appreciate that. And I did talk with Chairman Hyde about this as well, and I believe he shares some of your concerns.

Mr. GEKAS. All right.

The gentleman from Illinois is recognized for 5 minutes, if he so chooses.

Mr. FLANAGAN. Thank you, Mr. Chairman.

I thank the Speaker for coming today, and I certainly associate myself with Chairman Gekas's remarks about making sure that criminal investigations are not in any way impeded. I merely continue to be somewhat perplexed at the apocalyptic description you have, if this section is enacted that crime-fighting will come to a grinding, screaming halt and people will run rampant through the streets.

I realize it will take Federal courts some time to interpret the various entities mentioned in title VIII, and then without substantially impeding criminal investigations. But there is not a great body of law that could help us now insofar as the Attorney General of the United States or various attorneys general of the various States and their enforcement, in being able to discern with some accuracy what substantial problems they could avoid.

Ms. GORELICK. Would that it were so, Mr. Flanagan. There are no precedents that would allow one to interpret with any degree of certainty what this means. And I will tell you that I don't see how it means anything other than almost all undercover operations, all wiretaps. If that is what you mean, then just say it. I can't—I can't visualize a situation where we would now want to use an undercover operation in which we would also not think it particularly helpful to tell the subject that they are—

Mr. FLANAGAN. No, no, I—

Ms. GORELICK. So what I am trying to say to you is that this is one of those things you are either in or out of. I don't see that having Federal courts drawing this line is going to help law enforcement, nor do I see a body of precedent that would teach us what the ultimate result would be.

Mr. FLANAGAN. I am sorry, I was not sufficiently clear in my question. I was not speaking of purely criminal area. As Chairman Gekas, and I certainly will support him, to try to proscribe that from the act. I was speaking more about the RTC example, that you gave and the very idea of having a whistleblower, so that that regulatory agency does not abuse the people.

But yet, if it is an inexorable possibility that it will result in a criminal investigation, how far back through the RTC or through any other agency can we say that? Because there is a possibility it will result in a criminal investigation that would further be proscribed by some general prohibition in this act from its effect on criminal investigations, consequently, by including that language have we not gutted it?

Ms. GORELICK. You know, I don't see, again, why if your goal is not to hurt criminal investigations, then you would not just eliminate these provisions with respect to any kind of investigation or inquiry that has as one possibility a criminal referral. But let me try to address the purely civil question of, let's say, antitrust.

Most of our antitrust enforcement is civil. Now let's just assume that we are investigating whether you and your—and your competitor are fixing prices for the sale of bread or milk, and we are using as part of our civil inquiry one of your employees to talk about the meetings that you and your competitors are having.

Even if we have purely excluded, totally excluded criminal prosecution as a possibility here, and this were purely civil, I doubt that you would want us to have to tell you that your employee is telling us about ongoing meetings where you are fixing prices. It would gut the enforcement of that part of the law.

Now, if you want to change the law and say it is all right to fix prices, that is fine. But it is very difficult for us to have that law to enforce and then not to use the most obvious tools to enforce it.

So what I would urge upon you is not to draw so readily the simple lines between civil and criminal. We enforce very important rights and concerns civilly. I would hate to have a situation in which we don't know that someone is dumping mercury into Lake Superior because we have to give notice that we are going to come and see if their pollution control devices are on. That is purely, in most cases, purely a civil inspection.

But to give notice or to have to bear the burden of litigating that, we would have been substantially impeded if we had given the notice. You know, it puts us in an almost impossible box. I tell you, I think that the direction you were heading in this morning of making regulations simpler and more understandable to people, gives you much more bang for your buck than attacking it in this way.

I understand that there are abuses and that people are unhappy sometimes with the way in which government investigators investigate. But please think carefully about what you are doing, not



just in the criminal area, but in the civil area, before you go down this road.

Mr. FLANAGAN. All right. I would thank you. And your observations are, indeed, cogent. But I would tell you that the purpose of both of the examples you gave was to proscribe the activity not to catch the perpetrator. The reason we don't want mercury dumped in the lake is because we don't want mercury dumped in the lake, not because we want to catch people dumping mercury in the lake.

I am not altogether certain that notice up front is going to inhibit that, insofar as you will proscribe and you will catch the perpetrators, because you have enhanced through whistleblowing the abuses of the regulatory system that go through.

It is a little bit of a long argument, but I will tell you that to protect the criminal investigation throughout, you have also in here the substantial language that I think will walk that gray line that you have described, particularly in the RTC argument, which was a very good example of where it may become criminal, that would be in a decision in your hands if a Federal judge would or would not approve. Over time, a body of case law would build up and we would provide better protection over time and not less.

Ms. GORELICK. If I might just comment very briefly, the purpose of my pollution control device example was not to suggest that what we are trying to do here is to play "got you" with somebody. But telling somebody that they are subject to inspection without notice, gives them a much greater incentive to keep that sometimes expensive pollution control device on rather than off. If you have to give them notice, then they can turn it on when they have the notice.

It is really designed to make sure that people uniformly understand that there is a requirement and statute. If you don't want the requirement, then remove it from the regulation. But please don't disarm us from the ability to help make sure that people have those devices on rather than off.

Mr. FLANAGAN. Thank you.

Thank you, Mr. Chairman.

Mr. GEKAS. The time of the gentleman has expired.

The Chair recognizes the gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you very much. I must say—

Mr. GEKAS. Pardon me, for 5 minutes.

Mr. NADLER. Thank you very much.

I must say that 20 years ago, I would have looked at this with a very different eye than I do now. And 20 years ago, my civil libertarian impulses were much more absolutist than they are now, and I would have said wonderful, we are eliminating all wire-tapping, all searches, all seizures, and the minor impact that will have on criminal and civil enforcement, so what.

Twenty years of experience says that isn't such a great idea. And I have a less absolutist interpretation, probably more absolutist than most of my colleagues on the other side of the aisle, but less absolutist than I did 20 years ago.

And the gist of your testimony is that this would essentially gut all enforcement, and in looking at this, I share your opinion.

I just have a couple of questions. I think you have already answered one that I was going to ask, which is that we shouldn't only



look at this on the criminal side. It is clear to me from what you said, you can't predict when you start an action on the civil side whether it is going to go criminal or not, and therefore simply saying this doesn't apply to criminal actions won't help, because by the time you have determined it is a criminal action, you have already warned and told them to destroy the evidence and everything else.

Second of all, let's look specifically at the civil side. Would you say this is as important, that this is as destructive of civil enforcement of laws that we pass, not just regulation, but laws, as it would be of criminal enforcement?

Ms. GORELICK. Absolutely, there is just no question about it. Much of our compliance structure depends upon the relative informality of inspections and inquiries, and if you provide notice, if you had this right to remain silent, if you had the right to have an attorney present at all times when anyone in your company was being interviewed, it would gut it.

Mr. NADLER. So this would make it much easier to pull off the S&L scandal and insider trading?

Ms. GORELICK. Let me give you an example. The S&L scandal cost the American taxpayers upward of \$250 billion.

Mr. NADLER. Five hundred.

Ms. GORELICK. Upward. That is double. I stopped counting, I guess, at 250. Under title VIII, a savings and loan would not have to respond to the regulator coming in to say, "may I look at your books?" I would not have to respond at all. If a person in the savings and loan were willing to tell the Government about some of the practices that we have heard about, that were going on, he would have to do that with his boss and the boss' lawyer sitting next to him.

The enforcement of laws like that is literally unimaginable under this rubric. And if you look at environmental laws, health and safety laws—it would be endlessly more difficult.

Mr. NADLER. Thank you.

Let me ask one other question with slightly different benefits. Actually two questions at one point. No. 9 of section A, says a person would have the right to receive attorney's fees and other expenses from the Government when the Government commences a frivolous civil action against such person.

Do you know what frivolous means?

Ms. GORELICK. There is case law on "frivolous," but it doesn't give you a very clear definition in guiding what is considered frivolous.

Mr. NADLER. Can you think of any reason that says you should have the right to recover attorney's fees and other expenses from the Government, the Government commences a frivolous civil action, assuming that it is determined a desirable thing to do? If we determined that was a desirable thing to do, could you think of any reason of equity why we shouldn't amend that section to say that you can receive attorney's fees and other expenses from the Government when the Government commences a frivolous civil or criminal action against such person?

Ms. GORELICK. I don't know whether there is a distinction in policy between the two.

Mr. NADLER. That is what I am asking.

Ms. GORELICK. And as you well know, of course, we don't have this rule in ordinary civil litigation between two parties. I mean, if you sued Mr. Flanagan, and you lost, you wouldn't have—I am sorry to report to Mr. Flanagan, but he would not have to pay you your attorney's fees.

Mr. NADLER. I am sure if I sued Mr. Flanagan, it would be frivolous.

Mr. FLANAGAN. Thank you, Mr. Nadler.

Mr. NADLER. You are quite welcome.

The reason I asked the question was that I was thinking of a particular case in New York where the Justice Department brought a criminal case against a very prominent political figure. In fact, he was the speaker of the assembly. His actions in that case, even if the facts were admitted, were not a crime. He was convicted but the court of appeals unanimously reversed because the actions he was charged with having committed were not in fact against the law. And you know that was the end of case, except he owes money and his life was ruined. He was out of office and he owed \$700,000 in legal fees.

And the fact is that any middle-class person, if you are very poor you get legal aid, but if you are middle class and you are the subject of a criminal indictment, you can be acquitted and the case can be thrown out before it ever comes to trial, and you are still ruined financially for life. And yet, we have no provision to deal with that. And if the case is frivolous, if it should never have been brought in the first place, if we are going to say that there should be recovery of attorney's fees on frivolous, whatever that means, civil actions, why not on frivolous criminal actions?

Ms. GORELICK. I take it that is a rhetorical question?

Mr. NADLER. Well, you have acknowledged it already by saying you see no policy difference. But the other question, there is no really good law on frivolous.

Ms. GORELICK. It is subject to many interpretations.

Mr. NADLER. Well, would you recommend that if we were to keep that provision in here, that we should put in a tight definition of frivolous?

Ms. GORELICK. I have to tell you in the short period of time between the scheduling of this hearing today, it was all I could do to master the provision and determine that we were wholly against it. I haven't tried to edit it.

Mr. NADLER. Thank you.

Mr. GEKAS. Does the gentleman from Georgia seek recognition?

Mr. BARR. Thank you, Mr. Chairman.

Mr. GEKAS. Recognized for 5 minutes.

Mr. BARR. Thank you.

Would, in your opinion, Ms. Gorelick, the best way—and I am sensitive to the fact, as you just mentioned in response to Mr. Nadler's inquiry—that you haven't really had an opportunity to go over this in great detail—but from your review of it thus far—and I am very sensitive to the issues that you raised here, which I presume you commented on or orally as well. Is there some way that this bill could be amended to provide sufficient exceptions for the sort of law enforcement operations that you are talking about here or, in your opinion, is the whole thing so defective that it cannot

be remedied? I would hope that we could fashion some sort of exceptions in here, but I would like your opinion on that, please.

Ms. GORELICK. Let me say, I am by nature, someone who seeks a compromise, if there is one. This bill really challenges that impulse. I would have to look very seriously and hard to see whether there is something that one could salvage from it.

All the obvious solutions are very problematic; that is, simply excising criminal, or some of the other things that we have discussed. And I guess I would like to defer my answer to your question.

Mr. BARR. OK, I would be very happy—with the chairman's indulgence—would be very happy to work with this witness with regard to providing further information.

Mr. GEKAS. We encourage you to do that.

Mr. BARR. Thank you, Ms. Gorelick.

Mr. GEKAS. Which brings me to the final thesis that I wanted to propound; that I strongly believe in judicial review as we have proposed it in this entire bill. Hopefully, if it works out the way you want it to in a semiperfect system, we want to put together judicial review, that there would be less inclination or less need for delving into the other point of view, the source of information, the whistleblower, the Bill of Rights, and all of that. Perhaps we could revisit these sections only after a reasonable period of time, to see whether judicial review, itself, if we finally adopt it, helps to solve some of the problems, makes everybody more confident in the system and information is more flowing, et cetera.

That may be the final solution to this immense problem. With that, we thank you for coming here.

Ms. GORELICK. Thank you.

Mr. GEKAS. Unfortunately, you have made us think.

Ms. GORELICK. Thank you very much. I appreciate the opportunity.

Mr. GEKAS. The next panel will please come to the witness table. We understand Professor McGarity of the University of Texas Law School is testifying elsewhere so he will not be attending. But is Susan Eckerly here?

Ms. ECKERLY. Yes.

Mr. GEKAS. Yes, she is. And Edward Hudgins is here.

Dr. HUDGINS. Yes.

Mr. GEKAS. Good. Susan Eckerly is the deputy director of economic policy at the Heritage Foundation and Edward Hudgins is director of regulatory studies at the Cato Institute and formerly with the Heritage Foundation. So we are pleased to have both of you here at the same time. You might be joined intrusively by your third panelist during the course of your presentation. Why don't we start with Ms. Eckerly.

#### STATEMENT OF SUSAN ECKERLY, DEPUTY DIRECTOR OF ECONOMIC POLICY, THE HERITAGE FOUNDATION

Ms. ECKERLY. Thank you. Thank you for inviting me here to testify today and I wish to ask that my written statement be submitted.

Mr. GEKAS. If there be no objection, it will be so ordered.

Ms. ECKERLY. Let me start by saying, one, I am not a lawyer so please forgive me. And secondly, that by saying that I agree very



much that this legislation needs work and that is what the legislative process is for. Despite the excellent testimony we just heard, which has been intimidating, I might say, I am not convinced that the legislation is totally broken yet.

Certainly, I don't want to hinder and I am sure none of us want to hinder cracking down on Aldrich Ames or impeding an investigation into the Medellin cartel. Having stated that, I am very sympathetic, though, to what I see somewhat as the principle of this title and that is that it addresses one of the loudest complaints I have always heard from small business owners and others against regulation and that is sometimes the way they are enforced, somewhat arbitrarily at times, and the lack of compliance assistance. And I fear that we have created such an adversarial relationship between regulators and the private sector that we are losing sight of the end goal of regulation, which is compliance and hazard abatement. And I view the regulatory bill of rights provision and the whistleblower section as attempts, however crudely drafted, and I will get to that in a few minutes, as ways to address this problem and to give some assistance to individuals and businesses that we expect to comply with the large number of rules.

Let me point out just to juxtapose what was said earlier that the administration, too, recognizes that we have some problems with compliance with rules and I refer to this in my written testimony and I encourage people to look at this. One of the results of the Clinton administration's Executive order on regulatory review was that they created a small business forum on regulatory reform. And it consists of a five interagency industry-specific working groups.

And one of the working groups dealing with environmental issues noted that it is clear that many small businesses are uncomfortable discussing the issue of regulatory enforcement and compliance. As one small business owner stated, it is the gotcha rather than the help-you philosophy which is persevering in the Federal regulatory agencies.

In arguing for improved compliance help, the report states that while small businesses generally want to comply with Federal regulations, which I do believe most of them generally do, they do not have the resources to keep up with the latest regulatory changes. And what I like about the regulatory bill of rights is that it sets out some specific items that regulators have to inform the regulatee, for lack of a better word, about when that individual is the target of an inspection, I will say, because I, too, have some problems with some of the language.

For example,—and let—before I say this, let me say I used to work at the Department of Labor and I worked a lot with OSHA and so I know the most about their type of inspections, so I will refer to that. Generally when—from my experience there, good OSHA compliance officers, for example, when they walk on to a site for a routine inspection, generally good compliance officers say certain things. They tell the employer this is why I am here, what type of inspection it is and they work with the person and a few of the items listed in the regulatory bill of rights get at that and I think that is a good idea.

Not all compliance officers do this kind of thing. And one suggestion I would make, just to throw this out of here, and because there



wasn't a lot of advance notice, I have not given this a lot of thought—is from my knowledge of OSHA, if you look at compliance manuals that are given to—or field manuals given to inspectors, they lay out certain things that they advise an OSHA inspector, for instance, to do when they walk onto a site.

Maybe we could put out the suggestion to require all the regulatory agencies to take a look at their field manuals, what—maybe we could come up with a standard set of what we would like inspectors to do when they come on. And, again, I am talking probably we have to limit this maybe to routine inspections, not to criminal.

Again, you know, I throw that out to you all, the experts. This might be a way we could sort of get at the underlying principle under this legislation and without, you know, totally throwing it out. I, too,—I mean I could get into this more on the questions and answers.

I find the warrant aspect of the legislation very problematic, let me say. Under OSHA I know, for example, an employer already has a right to ask for a warrant and I know one trade group in town, organized resource counselors, has found that inspections actually tend to be more hostile if the employer presses the warrant issue and they found in an informal survey that fines go up—their fines go up when they press the warrant issue because it creates a hostile attitude. And also I am generally against paperwork and more work for lawyers and somewhat that is what this provision creates.

Finally, let me address the whistleblower section and, again, as I said before, and we all, I think, agree we don't want to see—we hope we can find a way to address the fear that individuals have that they will be retaliated against.

In my written remarks I refer to that. I found both working as a Senate staffer when we used to deal with constituents in Wisconsin, you do find that people are afraid. You know, Joe Blow runs a logging company or something is afraid to talk to you because somehow they see you as an amorphous part of the Federal Government and you might tell them and they will be inspected. And I don't think we should minimize that fear that exists out there. And I am sympathetic to this provision because however crudely drafted, it does try to get at that.

I don't know if I have a lot of suggestions how to fix it, not being an expert in this area, so I will take a punt on that one. But just to say a few of the problems I do have, I think at least the prohibited regulatory practices in there should be substantial and not just a contributing factor to the decision of a government employee to take a reprisal action.

I have problems with the civil penalty provisions, some of the same problems that have been brought up before about the high cost and I generally don't like punitive damages and don't like that provision in this—in the citizen suit section.

Let me conclude by stating that I think the Federal Government has a lot of work to do to educate and encourage individuals to comply with Federal rules. As I said before, the end goal of regulation is to promote compliance. A lot of that work has to be done not here, but in the education, labor—well, the new whatever com-

mittee that deals with labor issues and environment and so that is outside this committee. But we have heard a lot about why this legislation won't work and, hopefully, we can talk a little bit about is there a chance to salvage some of it. And thank you.

[The prepared statement of Ms. Eckerly follows:]

PREPARED STATEMENT OF SUSAN ECKERLY, DEPUTY DIRECTOR OF ECONOMIC POLICY,  
THE HERITAGE FOUNDATION

Mr. Chairman, distinguished members of the Subcommittee, my name is Susan Eckerly, and I am Deputy Director of Economic Policy and the Walker senior fellow in economic policy at The Heritage Foundation. Thank you for inviting me here to testify this morning on title VIII of H.R. 9, which establishes certain protections for citizens against federal regulatory abuses.

Most of the regulatory reform provisions in the bill focus on how to strengthen the regulatory review process before regulations are implemented. But title VIII addresses one of the loudest complaints against federal regulation—how they are enforced.

While the language in this section may need fine-tuning, it is essential that we not lose sight of the principle underlying this title of the bill. The scales have tilted so far in this country on behalf of the federal regulatory machine that we risk turning normal law abiding citizens into law breakers. Or as Robert Samuelson said recently in a column, "the explosion of laws and regulations makes more Americans potential outlaws." He quotes Cato president William Niskanen, who rightly points out "Regulations are so uncertain and subject to so much arbitrary interpretation that you don't know when you're (in violation)." It is time that we put some checks in place against this regulatory power.

Too often regulators forget that their goal should be increasing compliance with federal statutes, not adding notches to the regulators' enforcement belt. Chasing after business owners and private citizens in the same way they go after career criminals may make government enforcers feel good, but such adversarial relationships defeat the end goal of regulation-compliance and hazard abatement.

Let me give some examples of what I mean by regulatory abuses that I feel would be addressed by the citizens' rights and private sector whistle blower provisions in title VIII:

#### CITIZENS' REGULATORY BILL OF RIGHTS

To experts who follow government regulations, this title, which enumerates rights that citizens have during an investigative or enforcement action, may seem excessive. An opposite reaction most likely would be heard from a small business owner struggling to keep pace with the endless stream of federal regulations. Consider that the semi-annual federal regulatory agenda published last Fall proposes that 872 rules become final between October 1994 and April 1995.

The *National Law Journal* and Arthur Anderson Environment Services conducted a survey of more than 200 corporate general counsels in which only 30 percent of the attorneys stated they believed that full compliance with all state and federal environmental laws is even possible. The agencies do not do enough, in my opinion, to inform business about the rules and how they can comply with them. The Occupational Safety and Health Administration (OSHA), for example, spends three times more on enforcement than compliance assistance.

The problems with agency enforcement are outlined in the 1994 report of the Clinton Administration's Small Business Forum on Regulatory Reform which consisted of five inter-agency, industry-specific work groups. This forum was initiated in response to the President's executive order. One of the working groups dealing with environmental issues noted, "it is clear that many small businesses are uncomfortable discussing the issue of regulatory enforcement and compliance." As one small business owner stated, it is the "gotcha rather than the help-ya" philosophy which is persevering in federal regulatory agencies. In arguing for improved compliance help, the report states that while small businesses "genuinely want to comply with federal regulations," they do not have the resources to keep up with the latest regulatory changes.

Listed below are some examples of overzealous enforcement activities that could be averted with a Citizen Regulatory Bill of Rights:

In searching the media for various horror stories for a book Heritage will soon be publishing, we have found many stories reported in the media about the enforcement tactics used by the Food and Drug Administration.

I'll cite one example of their enforcement technique used when they were cracking down on vitamin supplements.

In 1992 more than two dozen armed general and state law enforcement officers, including FDA agents and county police, stormed into a Kent, Washington alternative medicine clinic and a pharmacy in the same shopping plaza. The officials were armed, and one officer put a gun in the face of the clinic receptionist and told her to get her hands up. The reason for the FDA raids was that they wanted to know what the doctors were prescribing and had concerns with how the pharmacy was dispensing drugs. Their particular concern was the use of injectable B-vitamin complex. The clinic and pharmacy had no prior record and local officers said the reason for the firepower was that they were under the direction of the FDA. FDA public affairs officials said that they had "to play a little rough to send a message to the whole industry."

Let me describe one story that appears in James Board's book, *Lost Rights*:

On March 10, 1992, U.S. Fish and Wildlife Service and state agents trespassed fifteen miles onto Richard Smith's Texas ranch, accused him of poisoning eagles, and seized his pickup truck. The agents later tracked down Smith's seventy-five-year-old father, W.B. Smith, and seized his pickup truck—threatening to leave an old man who had had five heart bypass operations ten miles out of town with no transportation. The agents produced no evidence to support their accusation and returned the trucks nine months later without filing charges.

Another story regards an EPA inspection in 1991. EPA inspectors inspected a landfill at a remote logging camp and left without leaving much indication of what they found. In July without prior notice EPA and the Department of Justice filed suit against the operator for a hazardous waste violation proposing hundreds of thousands of dollars on fines because of the illegal disposal and storage of three dozen batteries. After two years nothing had been done to resolve the problem despite numerous attempts to do so with the nearest regional EPA office.

These three stories all are signs of heavy-handed enforcement that emphasizes punishment and fails to help business and individuals understand why they are being regulated and how they are supposed to correct the problem.

The advantages of the Citizen's Bill of Rights language is that it requires an inspector to inform an individual why the agency is there, allows the individual to be present at the proceeding, and puts some checks on the behavior of the inspector

#### PRIVATE SECTOR WHISTLEBLOWERS' PROTECTION

It is outrageous if a government official goes after a citizen because he or she complains about a regulatory abuse. This kind of retaliation is completely unacceptable and undermines trust in the government and the ultimate goal of regulation—compliance. To the extent that this section will stop this retaliation, it should be supported.

Throughout the Small Business Forum report referred to above are recommendations to improve the atmosphere and trust between the regulators and private citizens. Most of them focus on improved compliance assistance. One reason why small businesses do not use more of these programs is that they fear retribution from the federal regulators and do not trust them. This retribution can come in the form of additional inspections, higher fines, or denial of permits needed to do business.

To what degree does this retribution take place? The fear certainly exists. In our work on regulatory reform at the Heritage Foundation, we routinely seek out examples of regulatory abuses but are unable to find many because of the fear of retribution. Companies and landowners who feel they have been unjustly treated refuse to put their name and face on it because they fear worse treatment. When I worked as a Senate staffer, we conducted a survey to find out how our constituents ranked certain issues. They rated regulation fairly high and penciled in specific complaints. In one case about OSHA, the constituent requested that we not tell the agency about the complaint because they were fearful of an OSHA inspection.

Federal policy should be directed not only at encouraging compliance but also to encourage the private sector to come forward with regulatory abuses. Just as federal whistleblowers are important to reinventing government and ferreting out waste, so are private sector whistleblowers needed to seek out regulatory abuses. Although I would again recommend some fine tuning, I do think this section is important to building some trust in federal regulatory enforcement.



## CONCLUSION

Not only do we need to improve the way regulations are written but we also need to improve the way they are enforced. The provisions in Title VIII are needed tools to improving both compliance with and enforcement of federal regulations. The federal government has all the advantages on its side: it knows the rules, it can enforce them arbitrarily, and it can impose very high penalties. This title provides some needed balance in the direction of the private sector. It gives them needed rights to know what they face from regulators and some protection from them.

Mr. GEKAS. Dr. Hudgins.

Dr. HUDGINS. Thanks a lot. I will summarize my remarks.

Mr. GEKAS. You have a written statement that you have submitted for the record. Without objection, it is ordered that it be included as part of the record.

**STATEMENT OF DR. EDWARD L. HUDGINS, DIRECTOR OF  
REGULATORY STUDIES, CATO INSTITUTE**

Dr. HUDGINS. Thank you. I want to thank the committee for the opportunity for us to testify on one of the most serious problems facing Americans today, and that is regulatory abuses. The American people elect a Congress to make laws to protect life, liberty and property and a President to administer those laws. But of late, the abuses of freedom have come from the agents of government themselves.

It is as if you hire a security guard to protect your building and you find that he is pulling stickups in the hall. So I think we are facing a bit of a problem here and the question is what are we going to do about it? I agree with the remarks of Congressman DeLay. I have heard for years these kinds of horror stories that we are trying to avoid. Often regulations are contradictory. There is a gentleman, the owner of a sausage factory in Baltimore, who told me that he had one regulator coming in saying he had to wet mop the floor every 2 hours and another one saying he had to keep the floor dry at all times.

There was a hospital administrator in Ohio who was directed by one EPA official to purchase a special incinerator for toxic waste. Yet, another set of regulations from the same agency prohibited the manufacturer from shipping those incinerators pending some additional inspections. Well, the hospital administrator was fined for not having the incinerator that other EPA officials wouldn't allow to be delivered.

These are the kinds of problems we have—the kinds of examples we are hearing all the time. Bill Ellen, an environmentalist built duck ponds I think it was out in Maryland. He acquired over 20 government permits, and assumed that he was safe from regulation. He ended up in Federal prison. Here's why. Ducks fly from pond to pond. Ducks, to put it delicately, defecate and under the wetlands provision, he was facilitating polluting the waterways of the United States just as if he dumped toxic waste into a river.

These are the kinds of abuses we are finding out there. Now, title VIII provisions begin to deal with these. The citizens' regulatory bill of rights would, I think, set up initial safeguards against arbitrary search and seizure. But I would suggest some very specific changes to the wording of that provision. My suggestion, would simply apply to one part of the abuses we are trying to deal with. I think you can probably make applications to others.



First, what I would do in the preamble is I would limit, at least at this point, the provision to regulatory inspections and searches, perhaps substituting some language that I offer in my testimony, something to the effect that whenever an agency of the Federal Government conducts a regulatory inspection or search, it must provide the owner or his representative with written notice of the legal basis of the inspection or search. I summarize in my written testimony better wording that includes the salient points of the legislation.

I would add several provisions, in fact, to tighten up the legislation. I would require the Government to issue receipts for all items seized. Again, some government agencies already do this as a matter of practice, but I would apply the requirement explicitly to all agencies. If samples are taken, have a dual sample. In some cases this is not done. If an EPA inspector takes a sample that might, in fact, lead to some kind of a case, certainly I think the owner or the manager should have a sample, as well. And I suggest some other things that would basically regularize what some agencies do now, though others do not, and make these more standard procedures.

Further, I would take out of the bill paragraph 4 about having an attorney or accountant present. In the context of an inspection, that is not necessarily relevant if an inspector just wants to look. I think paragraph 4 opens a can of worms and it does not necessarily detract from protection for rights if you take that particular one out.

I would also note, by the way, that given the way I have changed the legislation you could probably take the exemption for a criminal investigation out because you have already defined "regulatory searches" in such a way that law probably wouldn't apply to crimes. If you keep it in, it would be duplicative at best, but I am not too worried about that one.

I would, frankly, broaden the title to prohibit all warrantless searches. Now, what that would mean is not necessarily that you would have to get a search warrant as in a criminal investigation, but you would get an administrative warrant. If an inspector planned to go out and inspect a particular factory tomorrow, you would at least have to go to a judge and inform him he planned to do this. I think it would begin to regularize the process.

I want to mention also something about the issue of criminal investigations. These are indeed a problem because many actions prohibited to businesses are treated as criminal offenses but probably should only be treated as civil offenses. This has been the trend in regulation for the past couple of decades. I think that at some point—not in this hearing or with this bill—it must be addressed because, indeed, agencies often have a lot of leeway as to whether to charge someone with a civil offense, which requires a fine, or a criminal offense.

I want to address very quickly the whistleblowers' protection section. I think we need whistleblowers' protection again for the same reason Congressman DeLay mentioned.

Many of us in the research community—and I gather, many Members of Congress—hear constantly from people who have regulatory horror stories. But they don't want to go on the record be-

cause they say "I will get in trouble. You will go back to Washington, but the regulator will still be here and he will retaliate against me." I give one example of retaliation from my testimony of a researcher at the Black Hills Institute for Geological Research in South Dakota who dug up the largest tyrannosaurus rex skeleton on private land held in trust by the Federal Government.

They paid the Native American who owned the land a fee to dig up the skeleton. They worked on it for 2 years. The Justice Department seized it and said that it was an artifact and it was removed illegally from Federal land. When it was pointed out to Justice that an artifact means manmade and a T-rex is not, Justice never filed theft charges against these researchers. Justice kept the skeleton. They filed a bunch of other charges, which in this particular case smacks of retaliation.

We can give other examples. The point is that I think whistleblowers' protection is necessary and protection against retaliation. I want to add one final thing very quickly. I think that this title, in a sense, is the minimum protection for the victims of regulation. I would extend it further. I would establish a regulatory ombudsman's office in every agency, perhaps in conjunction with the Inspector General's Office. This would be the first line of defense for citizens. And it would give Congress a data base by which to judge the problems of regulation and try to deal with them because they would have a data base of examples.

I would include in every regulatory communication a set of regulatory *Miranda* rights informing the person who is receiving the notice from the regulator, that if he has a complaint, here is the phone number, and the address of the ombudsman's office. I think my time is running out so I will stop at this point and answer questions.

[The prepared statement of Dr. Hudgins follows:]

PREPARED STATEMENT OF DR. EDWARD L. HUDGINS, DIRECTOR OF REGULATORY STUDIES, CATO INSTITUTE

I want to thank the committee for the opportunity to testify on one of the most serious problems facing Americans today, abuse by federal regulators, and on the how Title VIII of H.R. 9 will help deal with this problem.

The America people elect a Congress to make laws to protect our life, liberty and property, and a President to administer those laws. But of late abuses of freedom have come from the agents of the government themselves. It is as if the security guard you hire to protect you business begins to pull stick-ups in the halls.

The abuses of which I speak fall into several categories.

Regulations often contradict one another, creating a "damned-if-you-do, damned-if-you-don't" situation. Examples:

One bureaucrat told the Baltimore sausage factory owner that his floor must be wet mopped every two hours, and another bureaucrat told him it must be dry at all times.

A hospital administrator in Ohio was directed by an EPA official to purchase a special incinerator for infectious waste. The administrator placed an order but before delivery, other EPA regulators forced the manufacturer of the incinerators to stop all deliveries pending a regulatory review of their products. The hospital administrator could not acquire the incinerator because of the actions of one set of bureaucrats and thus faced a fine from another.

The Exxon Corporation reaped public scorn and billions of dollars in fines and cleanup costs after one of its tankers hit rocks in the coastal waters off Alaska, causing a giant oil spill. The company, critics said, should have known better than to allow a man with a record of alcohol abuse to pilot a ship. Yet now Exxon is being sued for employment discrimination for dismissing a tanker engineer with a drinking problem.

In other cases, in spite of the best efforts of private citizens, it is impossible to determine before the fact what regulators require or prohibit. This is part due to the sheer magnitude of regulations, with some 70,000 pages in the Federal Register. But I give one particularly outrageous example to illustrate the point.

Bill Ellen, an environmentalist, created a wildlife sanctuary which included manmade duck ponds in Virginia. He acquire over twenty permits from regulators. But because ducks can fly from one pond to another, and because the ducks defecate in the ponds, Allen went to federal prison for polluting an inland waterway.

### TITLE VIII PROTECTIONS

American businesses and private citizens are correct to ask what are you, the law-makers, going to do to reign in your these out-of-control agents? Conceptually, the provisions of Title VIII of H.R.9 are a good first step towards this goal.

The Citizens Regulatory Bill of Rights would set up initial safeguards against arbitrary search and seizure by regulators that could undermine Fourth Amendment protections. I would, however, suggest some changes to the wording in Title VIII.

First, in the preamble, (a) General, I would limit the provisions of the rights to regulatory inspections or searches. Perhaps you could substitute for the current preamble something like "Whenever an agency of the federal government conducts a regulatory inspection or search, it must provide the owner (or his representative) written notice of the legal basis for the inspection and/or search. If the government has a warrant, it must give the owner a copy of the warrant along with all supporting affidavits. The government should also be required to furnish the owner with a written list of the names, titles, and agencies of each government agent who is participating in the search and/or inspection." I note that RCRA and Superfund do not expressly require the presentation of credentials prior to inspections.

Second, I would add several provisions, including:

The government must issue receipts for all items seized to the owner (or his representative).

If any type of samples are taken—such as a chemical or soil sample—a split sample must be offered to the owner of the premises. (I note that the Clean Water Act and the Clean Air Act do not presently require the government to provide split samples.)

If any photographs are taken, copies must be provided to the owner (or, upon request).

If government agents take or seize any documents, they must give the owner the opportunity to photocopy the documents on site before their removal or, alternatively, provide for off-site photocopying within 48 hours. (I note that this is necessary since the owner may need the records to continue day to day business.)

During inspections and/or searches, government agents must inform all employees *prior* to questioning that they have no legal obligation to answer questions from government agents and that they have the right to remain silent.

Third, in the current bill I would remove (4), the right to have an attorney or accountant present, since this would not be relevant for most inspections.

Fourth, I would remove section (c), paragraph (2) the exemption for criminal investigations, since by new wording would focus the provisions of this section more narrowly on regulatory inspections.

Finally, I would also broaden the Title by prohibiting all warrantless searches. Even for inspection it would afford better protection for the public if inspectors at least had to acquire an administrative warrant.

I also want to mention the problem of criminal investigations. Many actions or transaction in by businesses which should not be regulated at all are subject to government controls. Worse, Violation of regulations which at worst should be civil offenses have been made into economic crimes. In some cases regulator have broad discretion to determine whether a case is treated as a civil or criminal issue. In the future Congress should review all regulations with an eye to dealing with this problem.

### WHISTLEBLOWERS' PROTECTION

The need to protect whistleblowers is seen in the experience of many of us in the policy community as well as many member of Congress. We often will talk to individuals who feel they have been abused by regulators. When we ask if they will go on the record with their stories, they decline for fear that regulators will retaliate.

I offer one case that certainly smacks of revenge by regulators. The staff of the Black Hills Institute for Geological Research, of Hill City, South Dakota, in 1990



discovered the world's largest fossilized Tyrannosaurus Rex, which they nicknamed "Sue." Sue was found on private land, the title of which is held in trust by the Federal government for a Native American. The owner asked Institute staff to explore for fossils on his land and, when Sue was discovered, the Institute paid \$5,000 for the right to excavate and remove the fossil.

But on May 14, 1992 the U.S. Department of Justice sent FBI agents to seize the skeleton, which Institute personnel had already spent 10,000 labor hours preparing for assembly. At first Treasury claimed the T. Rex was an artifact removed contrary to the provisions of a 1906 antiquities act. But on finding rulings showing that this Act did not cover fossils, (artifacts are manmade, which T. Rex is not), Justice changed its story. It declared that Sue was "real estate" that the landowner could sell off only with the permission of the U.S. Secretary of Interior.

No charges were ever filed against the Black Hills Institute for dinosaur theft, and the Institute sued for the return of Sue. But daring to challenge arbitrary theft by government agents can be dangerous for the citizens of this country.

A team from the FBI and the U.S. Attorney's Office of South Dakota spent Sept. 26, 1993 to Oct. 8 in Japan investigating business dealing of the Black Hills Institute in what can only be considered as revenge against citizens who dare stand up for their rights. This 16 day junket included luncheons, parties, but only seven working days. A back-of-envelope estimate of the cost to taxpayers is \$50,000, minimum.

From the trip came a 39 count indictment against the Institute, staff members and some of the Institute's suppliers and customers, for money laundering, theft of government property and conspiracy under RICO statutes. (Indictments against two suppliers were recently dropped.) Since no law bans Black Hill's activities, they were indicted for breaking regulations made by unelected bureaucrats. (Newly proposed U.S. Forest Service regulations 36 CFR, Parts 261-262 would essentially ban all fossil and mineral collection on Forest Service land.) Federal agents also have made trips to Canada, Argentina and Peru seeking more ways to wreck vengeance on the Institute.

So now the power and vast funds of the federal government are poised to crush a handful of underfunded entrepreneurs who refused to be victims of arbitrary bureaucrats.

#### BEYOND TITLE VIII

I consider the provisions of this Title the minimum that might be done to protect citizens from regulators. I would go further.

First, I would establish a regulatory Ombudsman's office in each agency, perhaps in the Inspector General's office. This would be a first line for citizen complaints and give Congress a data base by which to judge the extent of regulatory abuses.

Second, I would include in every communication between a regulator and a citizen Regulatory Miranda Rights, informing them of the exist, address and phone number of the Ombudsman's office.

Third, I would set strict time limits on how long regulator can take to do their jobs when approval for some kind of private action is needed. If regulators fail to meet their deadlines, permission for the action would be automatically granted unless certain very strict criteria warranted an exception.

Mr. GEKAS. Time is running out for all of us.

Dr. HUDGINS. Indeed. So I heard.

Mr. GEKAS. Yes. As a matter of housekeeping, we want to order, without objection, that the statement of Congressman Norman Sisisky be included in the record of these proceedings and the statement, as well, that of Prof. Thomas O. McGarity, who never made it back during the course of this testimony.

[The prepared statements follow:]

#### PREPARED STATEMENT OF HON. NORMAN SISISKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. Chairman, thank you for this opportunity to express my support for improvements to the Regulatory Flexibility Act proposed by Congressman Tom Ewing and included in Title IV of H.R. 9, the Job Creation and Wage Enhancement Act.

As a senior member of the Small Business Committee, I know that in survey after survey, small businesses list federal regulation as one of the primary obstacles to their survival and expansion. Small businesses are responsible for most new job cre-



ation in today's economy, and neither Democrats nor Republicans can afford to allow government regulations to stifle new job growth.

The original Regulatory Flexibility Act was passed with strong bipartisan support in 1980. The Act recognized that the burden of federal regulations weighs most heavily on small businesses. For this reason, it required federal agencies to analyze the impact of federal regulations on small business and find ways to minimize this impact.

Sadly, the Regulatory Flexibility Act has not lived up to its full potential. Agencies have too often viewed compliance as voluntary, paying lip service to the Act's requirements or ignoring them altogether. There is little doubt that the primary culprit has been the lack of any enforcement mechanism. Small businesses deserve the right to sue and make non-complying agencies take these requirements seriously.

In the past, legislation to strengthen the Regulatory Flexibility Act has enjoyed strong bipartisan support. Congressman Ewing's bill in the last Congress boasted a bipartisan roster of 260 cosponsors. H.R. 830 put teeth into the Act by providing for judicial review, as well as strengthening Reg Flex authorities within the SBA's Office of Advocacy.

I urge members of this committee to demonstrate the same bipartisan support for these improvements, which have been included in the Contract With America. They are the utmost importance to America's small business and to their champions in Congress.

Thank you.

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PREPARED STATEMENT OF THOMAS O. MCGARITY, W. JAMES KRONZER CHAIR IN LAW,  
UNIVERSITY OF TEXAS SCHOOL OF LAW

My name is Tom McGarity. I hold the W. James Kronzer Chair in Law at the University of Texas School of Law, where I teach courses in Administrative Law and Environmental Law. Chapter VII of my casebook on Environmental Law, which is used at many law schools around the country, is devoted to environmental enforcement, and I serve on EPA's National Enforcement Training Institute Advisory Council. I have also studied administrative enforcement in connection with a book on the Occupational Safety and Health Administration that I co-authored with Professor Shapiro of the University of Kansas. I am, therefore, very pleased to testify on Title VIII of the proposed Job Creation and Wage Enhancement Act.

Title VIII of the Job Creation and Wage Enhancement Act enacts a broad Citizens' Regulatory Bill of Rights and prescribes additional protections for private sector whistleblowers. The Bill of Rights has the clear potential to hamstring federal investigations into serious violations of health, safety consumer protection and environmental laws. The whistleblower protections are more innocuous, but they may have a "chilling effect" on federal employees engaged in legitimate governmental functions.

### CITIZENS' REGULATORY BILL OF RIGHTS

Section 8101 sets out the terms of the Citizens' Regulatory Bill of Rights. With some exceptions, any person who is the target of a federal investigative or enforcement action has the following rights:

- (1) to remain silent;
- (2) to be advised as to whether the person has a right to a warrant;
- (3) to be warned that statements can be used against them;
- (4) to have an attorney or accountant present;
- (5) to be informed as the scope and purpose of the agency action;
- (6) to be present at the inspection, investigation, or proceeding;
- (7) to be reimbursed for unreasonable damages;
- (8) to be free of unreasonable seizures of property or assets; and
- (9) to receive attorneys fees and other expenses from the Government when

the Government commences a frivolous civil action against such person. . . .

These rights do not apply if honoring them would (1) substantially delay responding to an imminent danger to person or property; or (2) substantially or unreasonably impede a criminal investigation.

Many of the provisions in the "Bill of Rights" are desirable attempts to ensure that targets of administrative investigations know their rights under existing law. Some of the rights, such as the right to be informed of whether a warrant is required and the right to have an attorney or accountant present, may be well-intentioned attempts to provide the "little guy" a level playing field. However, the overall impact of this proposed Bill of Rights will be to afford scofflaws numerous opportu-

nities to avoid detection and prosecution while affording law abiding citizens very few substantive protections beyond what they already possess under existing law.

The right to have an attorney or accountant present at an inspection, for example, will predictably be used by organized crime (in the case of EPA inspections into questionable hazardous waste activities) and unscrupulous employers (in the case of OSHA inspections following serious injuries) to stall inspections until evidence of violations can be removed. But it is of little value to the target of an Internal Revenue Service or Immigration and Naturalization Service inspection who can afford neither an attorney nor an accountant. At best, this "right" will offer some modest protection to small businesses who can afford attorneys and accountants, but are not otherwise savvy enough to call their lawyers as soon as the inspection begins.

The issue is not whether attorneys and accountants should be allowed to observe agency inspections. In general, they are allowed to observe and even participate in the inspections with which I am familiar. The problem with bestowing a "right" to have an attorney or accountant present is that a company can invoke this "right" as grounds for refusing the inspector entry onto the premises or for stopping an inspection in its tracks until an attorney and accountant can be summoned. Given the target's right to demand that its lawyer or accountant be present at any moment during the inspection, the agencies as a practical matter will be forced to forego unannounced inspections. In practice, this right will afford criminals an opportunity to clean house before the inspectors are allowed to observe the scene of the crime.

This Bill goes considerably beyond the protections afforded by the Fourth Amendment to subjects of agency investigations. For example, the Fourth Amendment does not entitle the subject of a criminal investigation to be informed of the scope and purpose of the law that is allegedly being violated. Coupled with the target's Fourth Amendment right in many contexts to insist on an administrative warrant, this provision could give regulatees the information that they need to make temporary improvements that remain in place only until the investigation has been completed.

The Bill could even be interpreted to repeal existing provisions in narcotics statutes that allow federal agents to seize the property of suspected drug dealers. It would at the very least allow narcotics suspects to challenge such seizures as being unreasonable.

Finally, the right to attorneys fees for frivolous inspections invites regulatees to file harassing lawsuits against the agencies in an attempt to discourage future inspections.

#### PRIVATE WHISTLEBLOWER PROTECTION

Section 8204(b) prohibits any employee of a federal agency or of a state agency administering a federal program who has authority to take or require others to take regulatory action or to recommend that regulatory action be taken because of any disclosure by any person of information that he or she believed to be indicative of several types of improper conduct on the part of any federal agency or state agency acting under federal authority. Allegations giving rise to whistleblower protections under section 8204(b) include:

- (I) violation or inconsistent application of any law, rule, regulation, policy, or internal standard;
- (II) arbitrary action or other abuse of authority;
- (III) mismanagement;
- (IV) waste or misallocation of resources;
- (V) inconsistent, discriminatory or disproportionate enforcement;
- (VI) endangerment of public health or safety;
- (VII) personal favoritism; or
- (VIII) coercion for partisan political purposes;

According to section 8604(b)(2), it is enough that the disclosure of information was a "contributing factor" in the recommendation of action or taking of relevant action.

The statute provides a wide range of remedies to the whistleblower. Perhaps most importantly, proof that communication of relevant information was a contributing factor in the agency's decision to take regulatory action is a defense to the regulatory action. The agency or a court may order the whistleblowing entity to come into compliance with the relevant requirement, but it may not assess any fine or penalty against the entity for past noncompliance. In addition, any agency or any employee of any agency that is guilty of taking adverse action against a whistleblower may be fined \$25,000 per day. Finally, whistleblowers can file citizen suits for actual and punitive damages against agencies and employees who unlawfully take or recommend adverse regulatory action against the whistleblowers.

Protection of whistleblowers generally represents sound public policy. It takes a lot of courage to blow the whistle on mismanagement, political coercion etc., and

citizens and government employees who do so should be protected from retribution. Otherwise much waste and mismanagement will go unreported.

This Bill, however, goes far beyond providing effective protections to private citizens who report governmental mismanagement and waste. The Bill would allow anyone who at any time publicly complained about alleged arbitrary action, inconsistent application of an agency policy, waste of resources, favoritism, or any one of a number of other indiscretions to claim that any it was a "contributing factor" in any subsequent agency action taken against that individual or his or her company.

Since successful proof of the allegation could result in the waiver of any fines for past violations, companies can be expected to raise this easy-to-allege defense in nearly all enforcement actions. Alleged whistleblower retaliation will therefore become a familiar defense to agency enforcement actions.

Worse, the ever-present threat of a private lawsuit will have a significant "chilling effect" on agency enforcement actions. Any agency employee who beams that a regulatee has made allegations that the agency has been arbitrary or has abused its authority will think twice about recommending or initiating action against that regulatee for fear that the regulatee will retaliate with a multimillion dollar lawsuit for lost profits and business opportunities attributable to the regulatory action, plus punitive damages and attorneys fees. Since section 8203(2) would extend the scope of coverage to state pollution control agencies that have been delegated authority under the federal environmental laws, the chilling effect will extend to state enforcement actions as well.

For example, a company that wanted to discourage an agency from taking enforcement action against it could simply purchase a full-page advertisement in a newspaper with national circulation and allege in the article that the agency had been arbitrary in some regard, had inconsistently applied one of its internal standards, or had sought a "disproportionate" penalty against the company. Such charges are frequently made in widely circulated reports, advertisements, and even congressional testimony. Any state or federal agency employee contemplating action against that company, having become aware of the company's criticism of the agency, would have to think twice before recommending that the action go forward. If he or she did recommend action, the employee must be prepared to defend a lawsuit alleging that a contributing factor in that recommendation was the employee's knowledge of the company's public criticism of the agency. Any state or federal official that has the courage to put his or her life savings at risk by vigorously pursuing law violators should be awarded a medal of commendation.

The fundamental problem with these ambitious whistleblower protections derives from the difficulty a fact-finder faces after-the-fact to ascertain what motivated a person to recommend that an agency take a particular action. Before subjecting public officials to the threat of personal financial ruin, the statute should draw very clear lines defining proper and improper conduct. The standards articulated in this Bill are far too vague. Several existing statutes contain whistleblower provisions to protect federal employees and private employees from retaliatory action. If the Committee is serious about providing whistleblower protection that does not thoroughly disrupt federal enforcement activities, it should borrow language from the existing whistleblower protection statutes.

#### CONCLUSION

In the context of criminal investigations that target midnight dumpers, section 8101 might more accurately be described as the "Mafia Protection Act," because it gives illegal waste disposers numerous advantages over criminal investigators. As EPA's hazardous waste disposal regulations encompass more hazardous wastes in the future, pressures will mount to dispose of them illegally. Congressional hearings have already documented heavy Mob involvement in hazardous waste disposal. This Bill will facilitate organized crime's efforts to evade prosecution.

The whistleblower protections will make agency officials very reluctant to initiate rulemaking and enforcement actions that might spawn a multimillion dollar private retaliatory lawsuit. It is hard enough to attract competent and energetic people to government service, given its relatively poor compensation and (in recent years) low prestige. If these whistleblower protections are enacted, a career in government service should not be high on the list of bright young college graduates.



## PREPARED STATEMENT OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission appreciates the opportunity to comment on Titles VI, VII and VIII of H.R. 9. We respectfully request that these comments be made part of the Subcommittee's hearing record on this legislation.

The Commission endorses the legislation's goals of reducing the costs and complexity of regulation and protecting potential defendants in investigations. The Commission has worked vigorously to achieve these goals, while striving to be cost-effective in this time of consolidation. These titles of H.R. 9, however, do not achieve the goals of simplification, citizen protection or cost reduction; rather, they would divert increased staff time to costly and unnecessary delays. These delays could substantially impede Congressional policy to protect investors. The Commission's rules are drafted and implemented in cooperation with the securities industry; Titles VI and VII would delay and complicate the process of writing these rules. Title VIII would create broad new categories of dilatory litigation in the federal courts, seriously complicating the SEC's mission of investigating and prosecuting violations of the securities laws.

*Title VI—Strengthening Regulatory Flexibility.* Section 6002, which would require an agency to consider indirect as well as direct effects of proposed rules, seems likely to force agencies into rather speculative attempts to discern indirect effects. Section 6003, which would require that every proposed rule be provided to the Small Business Administration ("SBA") thirty days before it is published, would create an unnecessary delay of at least thirty days between agency action and publication of a proposal. If Congress desires to increase the role of the SBA in regulation, it would make more sense to require that agencies provide SBA a copy of proposals when they are published.

*Title VII—Regulatory Impact Analyses.* This title would reinstate the regulatory impact process of Executive Order 12291 and make various other changes to the rulemaking process. Many of the proposed changes would increase the time required and cost involved in writing rules to implement legislation.

For example, under Section 7002, for each "major rule," defined to include any rule affecting more than one hundred persons, an agency would have to issue a notice of intent to engage in rulemaking ninety days before issuing the proposed rule. Under Section 7003, an agency would have to hold a public hearing on a proposed rule if "more than 100 interested persons individually submit comments." Virtually all SEC rules would be "major rules" subject to Section 7002, and the hearing requirements of Section 7003 would also be triggered in many SEC rulemakings.

Under Section 7004, for each major rule, an agency would have to prepare both a preliminary and a final regulatory impact analysis addressing *twenty-three* factors. Some factors seem designed to require expensive cost-benefit analyses for even the most simple rules. Other factors, such as the various requirements to explain the legal background of the rule, seem designed to facilitate court challenges to agency rules.

Title VII would also substantially reduce the independence which Congress has traditionally provided to the SEC. Under both Executive Orders 12,291 and 12,866, the independent agencies have generally been exempt from the regulatory review process; Section 7004(d) would explicitly extend the regulatory review requirements to these agencies. Thus, under Section 7005, the SEC could not adopt a major rule unless the OMB had approved the final regulatory flexibility analysis. Under Section 7006, the SEC could not propose a major rule unless the OMB certified that the proposed rule, and related summary and analysis, met various "clarity" standards, such as whether they contain "only sentences that are as short as practical and organized in a sensible manner."

*Title VIII—Protection Against Federal Regulatory Abuse.* Although this title purports to give rights to citizens, it would in fact make it difficult for the Commission to protect citizens from those who engage in securities fraud.

The Commission takes the rights of witnesses and potential defendants seriously. The Commission's rules provide witnesses various rights, including the right to review the formal order of investigation, to be represented by counsel and to obtain a copy of the transcript. See 17 C.F.R. § 203.7. In most cases, the Commission also, before it initiates an enforcement action, notifies the proposed defendant and allows him or her to submit a written statement, which is considered by the Commission along with the enforcement recommendation. See *id.* § 202.5(c).

Some of the proposed "rights" in Title VIII, however, would seriously interfere with the Commission's ability to investigate and prosecute violations of the federal securities laws. Section 8101 would give each "target" of an enforcement investigation the "rights" to be informed at the "outset" of the investigation of the "scope and



purpose of the agency action" and "to be present at the inspection, investigation, or proceeding."

These vaguely worded provisions could allow those who consider themselves targets of SEC investigations to insist on a full description of the investigation, to notice of and attendance at the interviews with other witnesses, and even to attend the Commission's own deliberations on the proposed enforcement action. To the extent such "rights" are recognized by the courts, they would allow those who have violated the securities laws to alter their testimony, destroy documents, intimidate witnesses, and transfer funds. Litigation over the scope of such "rights" is also bound to burden the Commission and the courts.

In 1984, the Supreme Court considered and rejected a far more limited asserted right, the right to notice of subpoenas to other witnesses in an SEC investigation. The Court based its decision not only on the absence of any basis for the claimed right in the Constitution or the securities laws, but also on two policy arguments. Since these arguments are equally relevant here, we quote at some length:

First, administration of the notice requirement advocated by respondents would be highly burdensome for both the Commission and the courts. The most obvious difficulty would involve identification of the persons and organizations that should be considered "targets" of investigations. The SEC often undertakes investigations into suspicious securities transactions without any knowledge of which of the parties involved may have violated the law. To notify all potential wrongdoers in such a situation of the issuance of each subpoena would be virtually impossible. The Commission would thus be obliged to determine the point at which enough evidence had been assembled to focus suspicion on a manageable subset of participants in the transaction, thereby lending them the status of "targets" and entitling them to notice of the outstanding subpoenas directed to others. The complexity of that task is apparent.

Second, the imposition of a notice requirement on the SEC would substantially increase the ability of persons who have something to hide to impede legitimate investigations by the Commission. A target given notice of every subpoena issued to third parties would be able to discourage the recipients from complying, and then further delay disclosure of damaging information by seeking intervention in all enforcement actions brought by the Commission. More seriously, the understanding of the progress of an SEC inquiry that would flow from the knowledge of which persons had received subpoenas would enable an unscrupulous target to destroy or alter documents, intimidate witnesses, or transfer securities or funds so that they could not be reached by the Government.

*SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 749-50 (1984) (footnotes omitted).

Other provisions in this proposed "bill of rights" are equally troubling. A witness could claim that the right to "be reimbursed for unreasonable damages" requires reimbursement for documents produced but not used in an investigation. A securities firm could argue that the right to notice of the "initiation" of an inspection or investigation prohibits the SEC from conducting surprise inspections of securities firms. In general, we expect that these "rights" would lead to substantial litigation, impeding the Commission's work and clogging the court system.

The second part of Title VIII purports to protect "private whistleblowers" by prohibiting any agency from acting against a person on the basis of "disclosure" by that person or another person of "information the person believed indicative" of "arbitrary action," "inconsistent, discriminatory or disproportionate enforcement," or other similar regulatory practices. This provision could encourage the subjects of investigations to state that the Commission is acting arbitrarily and inconsistently, and then claim in the subsequent enforcement action that they were sued in part because of these statements. Under Sections 8204(b)(2) and 8205(b), a defendant could avoid liability, beyond a simple injunction to obey the law, simply by proving that his statements were a "contributing factor" in the agency's enforcement decision.

This part could also prevent agencies from disciplining their own officials for wrongdoing. If a citizen's complaint to an inspector general leads to a disciplinary proceeding or even prosecution of an agency official, the official could argue that the proceeding or prosecution is a "prohibited regulatory practice." The official's argument would be that the investigation began with "disclosure" by the citizen of violations by the agency official, that the resulting action was "recommended" by another agency official, the inspector general, with authority to take or recommend action, and that the action was taken "because of the disclosure."

Mr. GEKAS. We are going to consider this the close of the hearing after a brief questioning of both of these witnesses as time may permit.

I am really worried about the criminal implications that this could cause in all of the circumstances. I would welcome, however, a proposed set of rights for the disaffected citizens and would ask either individually or jointly if you could provide us, keeping in mind what you heard here today. That would be a great help to us because we want to prevent retaliatory actions.

We want to ensure nonshock inspections, et cetera. But I must tell you, I am very worried about—and it hasn't—it wasn't just the testimony that we heard from the Justice Department today. This fear is inherent in all of us that in advancing the cause of one set of citizens we trample on the justice system perhaps in another vein. So I invite you to do that. In fact, I formally request it, if you need that kind of request. I yield to the gentleman from Rhode Island.

Mr. REED. I thank the chairman. I, too, share his concern from what we have heard today and I also think the witnesses recognize, too, that we have a lot of work to do for something to be done in this area.

Another issue I think both Ms. Eckerly and Dr. Hudgins brought up is it is not just the activity of one Federal investigator or Federal official, it is the coordination problem where regulations are piled upon another. I would note there is nothing in the section that addresses that at all, the fact that it is not just the IRS, it is OSHA; it is everyone else. That is just a point I want to make.

And the other point I would like to make is it is interesting how you both, I think Ms. Eckerly and Dr. Hudgins are very emphatic about the need for a warrant or some type of written permission to do any of these investigations. In fact, in the committee a few days ago, we dispensed with that in some categories for law enforcement officers. So I guess sauce for the goose is sauce for the gander.

Ms. ECKERLY. Actually I wasn't. I spoke against it. All I said is OSHA currently does require it. Just to clarify that.

Mr. REED. Thank you. Again, I thank the chairman and I think we have some work to do, Mr. Chairman.

Mr. GEKAS. Yes, thank you. The gentleman from Illinois—Florida—Georgia?

Mr. BARR. Georgia.

Mr. GEKAS. That is right. I looked straight through Illinois and saw Georgia.

Mr. BARR. World of difference there, Mr. Chairman. Thank you, Mr. Chairman. If I might make a couple comments and ask unanimous consent to include an opening statement in the record.

Mr. GEKAS. Without objection.

[The opening statement of Mr. Barr follows:]

OPENING STATEMENT OF HON. BOB BARR, A REPRESENTATIVE IN CONGRESS FROM  
THE STATE OF GEORGIA

Mr. Chairman and members of the subcommittee, today we take yet another step forward in fulfilling commitments many of us made to the American people last year in our Contract with America. An important part of this promise was the Job Creation and Wage Enhancement Act, H.R. 9, designed to ease tax burdens, reform fed-

eral bureaucracies, protect the property of private land owners, and hold the federal government accountable for the burdens it imposes on American workers.

Big government red tape and regulation costs the U.S. economy hundreds of billions of dollars each year. Federal regulations directly impact American lives by raising the prices they pay for good and services. Both production and wages are depressed as businesses, forced to comply with unnecessary mandates from Washington bureaucrats, spend millions and millions of dollars and devote hours and hours trying to figure the latest federal regulations.

We all know, after years of dealing with this problem, the cost of ever-increasing taxes on capital and investment: lost jobs and stifled economic growth. In the simplest terms, H.R. 9 seeks to get government off the back of the American economy.

Our subcommittee will consider three important titles of this bill aimed at protecting American businesses from regulatory agencies. I look forward to today's mark up and to giving the people what they asked for last November: LESS GOVERNMENT!

Mr. BARR. Thank you. Mr. Chairman, I think these hearings have been very, very informative. Obviously, what we are engaged in here and what we will be engaged in in H.R. 9 is to me very delicate balancing act between rights of our citizens and overstepping on the part of government agencies, which we have seen.

I think it is a very legitimate area of inquiry. I think, given the testimony we have had here today, we have some areas that are problematic that we need to identify and work on, but I am very confident that we will be able to do that so that we can't reign in some of the overzealous regulatory problems that we have seen without impinging on legitimate law enforcement concerns of government. I look forward to that process. Thank you, Mr. Chairman.

Mr. GEKAS. I thank the gentleman. This session of this subcommittee stands adjourned. We will reconvene at 2 p.m. on Monday.

[Whereupon, at 1:50 p.m., the subcommittee adjourned.]





## JOB CREATION AND WAGE ENHANCEMENT ACT OF 1995

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MONDAY, FEBRUARY 6, 1995

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON COMMERCIAL AND  
ADMINISTRATIVE LAW,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 2 p.m., in room 2226, Rayburn House Office Building, Hon. George W. Gekas (chairman of the subcommittee) presiding.

Present: Representatives George W. Gekas, Bob Barr, Michael Patrick Flanagan, Steve Chabot, Jack Reed, and Robert C. Scott.

Subcommittee staff present: Raymond V. Smietanka, counsel; Roger T. Fleming, counsel; and Susana Gutierrez, secretary; full committee staff present: Agnieszka Fryszman, minority counsel; Perry Apelbaum, minority counsel; and Paul J. Drolet, minority counsel.

Mr. GEKAS. The hour of 2 o'clock having arrived, the session of this subcommittee will come to order.

Out of necessity by the Rules of the House, we need a quorum of two in order to begin a hearing, so we will recess until the appearance of another Member. The reason we began on time is because of my self-imposed rule that no matter what occurs, the gavel is going to fall at the appointed time, with the arrival of the gentleman from Virginia, we can continue the hearing. We thank you for your attentiveness and for your punctuality.

As everyone knows by now, the committee has been given the task of proceeding with consideration of that part of the Contract With America that deals with regulatory flexibility and specifically with three titles contained in H.R. 9.

We have had hearings that began on Friday on titles VI and some on VIII. Today's duty brings us to the meat of the sandwich, title VII, where we will begin with a panel of distinguished colleagues who are personally and professionally immersed in this issue and who are spokesmen for the inclusion of the issue in the Contract With America.

As everyone knows also, in a greater sense, this initiative on the part of this committee and for the cosponsors of H.R. 9 is to match the Executive initiative undertaken by President Ronald Reagan. It was only recently, in 1993, with the advent of the current administration, that there was a departure from at least a valid attempt to conduct what is now the subject of title VII.

So as we proceed, we hope the witnesses will, in any way that they can, allude to their experiences under Executive Order 12866 and how they predict, if we adopt H.R. 9, that might come about to that first Executive Order 12291 of the Reagan and Bush administrations. We would be glad to hear their comparisons, contrasts and expectations as they evolve.

Without further ado, we will begin with our first panel, which is composed of our colleagues—Congressman Franks and Congressman McIntosh. Congressman Franks in the last Congress, was deeply involved in the Manufacturing Task Force, and Congressman McIntosh recently held hearings and is pursuing a 6-month moratorium on regulations and the impact of regulations. So I would say they are both qualified.

I will tell you, I probably would let you speak even if you weren't qualified, because you asked to speak. And so on two counts, we welcome your testimony. You are my buddies, and on top of that, you have something to offer.

We acknowledge the presence of the gentleman from Ohio, Congressman Chabot.

Who wants to speak first?

#### **STATEMENT OF HON. BOB FRANKS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY**

Mr. FRANKS. Mr. Chairman, thank you for this opportunity. I am delighted to participate on this opening panel with my distinguished colleague, Mr. McIntosh, whose record in this field is well-known to all of us.

Mr. Chairman, over the past 2 years, I have talked to literally hundreds of business leaders, from owners of small shops to the heads of major U.S. corporations, and asked them what one thing the Federal Government could do to make their businesses more productive. The near unanimous response has been: Cut the red-tape.

Mr. Chairman, despite our good intentions in passing scores of laws to promote the public health and safety, we have created a regulatory system that has turned into a bureaucratic monster that often stifles economic growth, threatens job creation, and takes a huge chunk out of a family's income. Today, we have a system that has lost touch with the very people it is supposed to protect.

Take the case of a rule proposed by the Department of Transportation that was supposed to protect the public by regulating the bulk transport of certain kinds of hazardous material. It sounded like a competent idea, until you read the fine print and found out that, as written, it covered not only toxic substances, but everyday items found in your kitchen, including edible salad oil.

One manufacturer of vegetable oils in my home State of New Jersey estimated that complying with the regulation and treating his salad oil as a hazardous substance would have cost his company \$5 million a year. It took a public outcry to convince the Department of Transportation that a salad oil spill did not pose the same degree of threat as a hazardous waste spill, and they ultimately chose to withdraw the proposal.

While I am at it, let me share with you the case of the manufacturer of chocolate who found himself in the middle of a bureau-

cratic standoff. The Occupational Safety and Health Administration, in its efforts to protect workers from excessive noise, ordered the manufacturer to install porous insulation. At the same time, the Food and Drug Administration told the manufacturer that installing that insulation would violate the FDA standards because it could not be properly cleaned and therefore posed a potential health risk.

Just like the salad oil maker and the chocolate manufacturer, businesses and individuals throughout the Nation have discovered that we have a regulatory system that too often is irrational, unpredictable and unnecessarily burdensome. While some government analyses are doing an effective and efficient job in writing rules and regulations, others go far beyond the intent of the law and burden the public with cumbersome and costly regulations that drive up the cost of consumer goods and kill off job growth by making American business inefficient and less competitive.

With more than 100,000 Federal bureaucrats earning a living drafting rules and regulations, we need to bring some common sense, uniformity and predictability to the process of writing Federal rules and regulations. And the place to start is at the earliest stages of the regulatory process.

The regulatory impact analysis you are considering today is a result of meetings with scores of business leaders and individuals throughout the country who have found themselves snagged in government redtape, as well as government employees who write and implement these regulations.

This legislation would lay the foundation for a rational and fair regulatory process. It is designed to be a form of preventive medicine by requiring bureaucrats who write the rules to think before they act; to fully consider the consequences of their actions before they impose major new requirements on businesses and consumers.

It requires that they look for the least intrusive and most cost-effective way to get the job done. Most importantly, it would put the burden of proof on the Government agency to justify a change in the regulatory status quo.

As I go through the checklist of issues that would be addressed under this proposed regulatory impact statement, I am sure many of these questions will sound familiar. That is because they are often the ones raised by individuals and businesses after it is too late—after they have been forced to invest time and money to comply with a new regulation.

For instance, under this bill, a rulewriter would have to consider whether a proposed rule would conflict with or duplicate another regulation already on the books. Answering this question could have spared the chocolate manufacturer and many other businesses from being caught up in a regulatory tug-of-war.

Another question that would have to be answered by a rulewriter is how many individuals or businesses would be affected by the proposed regulation and what costs would they have to incur in order to comply with its provisions. With the annual price tag to American businesses and consumers for complying with regulations exceeding half a trillion dollars, every possible consideration must be given to finding the least costly way of meeting the objective of the regulation.



Next, rulemakers would be asked to consider if there is a better, simpler and less intrusive method to accomplish the same goal. I can't tell you how many times small business people have told me that they don't object to the intent of the regulation, they just don't understand why government makes compliance so difficult when there are far simpler and less costly ways to reach the same results.

Finally, under the regulatory impact statement, the rulewriters would be asked to put themselves in the place of the individual or business forced to comply with the proposed regulation. Before they issue the rule, they would have to ask themselves how much time will it take to fill out the paperwork required under the proposal. Then they would have to consider whether an individual or business applying for a permit would have to hire an attorney, or an engineer, or an accountant, or a consultant, or some other professional in order to meet the requirements under the proposed regulation.

From the beginning to the end of the regulatory process, regulators should treat American consumers and businesses as stakeholders in the process, not as adversaries. They should be required to make the extra effort to design a regulation that is not only effective, but practical and logical.

Critics of this legislation may contend that requiring regulators to complete a regulatory impact checklist is an unnecessary and time-consuming exercise. But, Mr. Chairman, the time invested in answering these questions at the start of the regulatory process could save the Federal Government, businesses and consumers substantial time and money down the line.

The mission of Federal agencies is to execute goals set forth by the Congress and the President. Solving real problems should be the goal of the regulatory bureaucracy, not setting arbitrary fees and assessing fines for paperwork violations. The uniform process established in the regulatory impact analysis ensures that the regulators and those subject to regulations will understand more fully how to protect and promote the public interests.

Writing rules and regulations is an important function of the Government. But we need a system that is rational, predictable, and fair, not one that confuses, frustrates and unnecessarily burdens the people it is designed to serve. This legislation is a good start.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Franks follows:]



PREPARED STATEMENT OF HON. BOB FRANKS, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF NEW JERSEY

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Mr. Chairman, despite our good intentions in passing scores of laws to promote the public health and safety, we have created a regulatory system that has turned into a bureaucratic monster that stifles economic growth, threatens job creation and takes a huge chunk out of a family's income. Today, we have a system that has lost touch with the very people and businesses it is supposed to protect.

Take the case of a rule proposed by the Department of Transportation that was supposed to protect the public by regulating the bulk transport of certain kinds of hazardous material. It sounded like a competent idea, until you read the fine print and found out that as written it covered not only toxic substances but everyday items found in your kitchen including edible salad oil. One manufacturer of vegetable oils from my home state of New Jersey estimated that complying with the regulation and treating his salad oil as a hazardous material would cost his company \$5 million a year. It took a public outcry to convince the Department of Transportation that a salad

oil spill did not pose the same kind of threat as a hazardous waste spill and they ultimately withdrew this proposal.

While I'm at it, let me share with you the case of the manufacturer of chocolate who found himself in the middle of a bureaucratic standoff. The Occupational Safety and Health Administration, in its efforts to protect workers from excessive noise, ordered the manufacturer to install porous insulation. At the same time, the Food and Drug Administration told the manufacturer that installing the insulation would violate FDA standards because it could not be properly cleaned and therefore posed a potential health risk.

Just like the salad oil maker and the chocolate manufacturer, businesses and individuals throughout the nation have discovered that we have a regulatory system that is too often irrational, unpredictable and unnecessarily burdensome. While some government agencies are doing an effective and efficient job in writing rules and regulations, others go far beyond the intent of the law and burden the public with cumbersome and costly regulations that drive up the cost of consumer goods and kill off job growth by making American business more inefficient.

With the more than 100,000 federal bureaucrats earning a living drafting the rules and regulations, we need to bring some common-sense, uniformity and predictability to the process of writing federal rules and regulations. And the place the start is at the earliest stages of the regulatory process.

The Regulatory Impact Analysis you are considering today is the result of meetings with scores of businesses leaders and individuals throughout the country who have found themselves snagged in government red tape, as well as government employees who write and implement these regulations.

This legislation would lay the foundation for a rational and fair regulatory process. It is designed to be a form of preventive medicine. It would require bureaucrats who write the rules to think before they act; to fully consider the consequences of their actions before they impose major new requirements on businesses and consumers. It requires that they look for the least intrusive and costly way to get the job done. Most importantly, it would put the burden of proof on the government agency to justify a change in the status quo.

As I go through the checklist of issues that would be addressed under this proposed Regulatory Impact Statement, I'm sure many of these questions will sound familiar. That's because they are often the ones raised by individuals and businesses after it's too late -- after they've been forced to invest the time and money to comply with a new regulation.

For instance, under this proposal, a rule-writer would have to consider whether this proposed rule would conflict with or duplicate another regulation already on the books? Answering this question could have spared the chocolate manufacturer and many other businesses from being caught up in a regulatory tug-of-war.

Another question that would have to be answered by a rule-writer is how many individuals or businesses would be affected by the proposed regulation and what costs they would they have to incur to comply with its provisions? With the annual price tag to American business and consumers for complying with regulations reaching between \$810 and \$1.1 trillion -- every possible consideration must be given to finding the least costly way of getting the job done.

Next, rule-makers would be asked to consider if there is a better, simpler and less intrusive way to reach the same objective? I don't know how many times small business people have told me that they don't object to the intent of the regulation, they just don't understand why government makes compliance so difficult when there are far simpler and less costly ways to reach the same results.

Finally, under the Regulatory Impact Statement the rule-writers would be asked to put themselves in the place of the individual or business forced to comply with their proposed regulation? Before they issue the rule, they'd have to ask themselves how much time will it take to fill out the paperwork required under their proposal. Then they would have to consider whether an individual or business applying for a permit would have to hire an attorney, engineer, accountant or other professional consultant in order to comply with the regulation.

From the beginning to the end of the regulatory process, regulators should treat American consumers and businesses as



stakeholders in the process, not as adversaries. They should be required to go the extra step to design a regulation that's not only effective, but practical and logical.

Critics of this legislation contend that requiring regulators to complete a Regulatory Impact Checklist is an unnecessary and time-consuming exercise. But the time invested in answering these questions at the start of the process, could save the federal government, businesses and consumers substantial time and money down the line. Much of the unnecessary paperwork, expensive delays and duplication inflicted on American consumers and businesses today by the federal bureaucracy could be avoided.

The mission of federal agencies is to execute goals set forth by Congress and the President. Solving real problems should be the goal of the regulatory bureaucracy, not setting arbitrary fees and assessing fines for paperwork violations. The uniform process established in the Regulatory Impact Analysis ensures that the regulators and the regulated will understand more fully what needs to be done and the best way to do it.

Writing rules and regulations is an important function of government. But we need a system that's rationale, predictable and fair -- not one that confuses, frustrates and unnecessarily burdens the people it is designed to protect. This legislation is a good start.

Mr. GEKAS. We thank the gentleman, and recognize his colleague at the table.

**STATEMENT OF HON. DAVID M. McINTOSH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA**

Mr. McINTOSH. Thank you very much, Mr. Chairman.

First let me say I wholeheartedly agree with the comments of my colleague in terms of this bill. I have a prepared statement that I will submit for the record.

Mr. GEKAS. Without objection, we will include it as part of the record.

Mr. McINTOSH. Let me just make a few comments and then turn back the rest of my time.

First, I am delighted to be here and delighted that you are taking up this issue and that the Congress will be taking up regulatory reform later this month. I think having labored long in this field, I too experienced on the campaign trail and in talking to citizens around this country, the American people want us to change in a fundamental way the way we regulate in this country, and they understand that regulations have become a hidden tax on the middle class, that families spend an inordinate amount of their moneys and their incomes on increased cost of product, the danger of losing their jobs, inability to live their lives to the fullest because of needless Federal regulations.

And so I commend this committee and you for taking up this portion of H.R. 9, and working with the other committees in Congress to make sure that that will be a reality in this Congress.

Let me share with you one person whom I met very early on when I started this quest to become a Member of Congress who has become a good friend of mine, a gentleman named Gary Bartlett who started his business in his garage in Muncie, IN, and he came up to me and said, "You know, I can compete on the world market." He makes leather seats that he sells to foreign automakers and American automakers, employs about 100 people.

He told me his biggest enemy in the marketplace was Uncle Sam. And I said, "What do you mean?" He said, "Well, it is all of these regulations and paperwork and oversight that I have to go through every day, take me away from creating more jobs and selling more product."

And that was just one of countless examples of people who I had encountered who were struggling to make ends meet in their small businesses, struggling to expand and hire more people, struggling to be competitive in a world marketplace.

My experience in working in the administration under Vice President Quayle at the Competitiveness Council showed me that the Executive order that President Reagan had put into place in 1981 had a very salutary effect in reminding the agencies that they needed to maximize the benefits of the regulation and minimize the costs on the economy. However, because it was only an Executive order, did not have the force of law, did not have separate judicially enforceable provisions, agencies could and often did choose to ignore that process and issued regulations in which the costs did not outweigh the benefits, in which the benefits were not maximized,

and in which more costly alternatives to the private sector were chosen over less costly proposals.

Unfortunately, in that process the citizen was not empowered to take part of the review. It relied upon the goodwill of the agency head to follow the admonitions of OMB and the centralized reviewers.

We found that if you could bring scrutiny and raise it to a high enough level, you could get a decision where the agencies would follow the Executive order, but time and time again it required constant vigilance on the part of OMB and the agents of the President to make sure that the rulemaking agencies followed the strictures of that Executive order.

One of the most important things that H.R. 9 will do is put into law the requirement that there be a cost-benefit analysis, the requirement that there be a risk assessment undertaken, the requirement that there be respect for property rights in the rulemaking process, and a requirement in this title for regulatory impact analysis.

I noticed in section 705 there is a requirement that before a rule could be issued, OMB must sign off on that risk, or that regulatory impact analysis. I urge you to keep that intact in this legislation as a very important fundamental change in the way government writes its rules.

In closing, let me suggest a couple of additional thoughts that the chairman and the committee may want to consider as they mark up this legislation. One would be to allow members of the regulated community to also enforce its provisions by giving them an opportunity for judicial review if the agencies have not complied, or if for some reason OMB and the centralized reviewers have not complied.

And the second is a problem that I first became aware of working at the Justice Department where there would be lawsuits that agencies had entered into—not entered into, but forced to defend agency actions, and that oftentimes the resolution of those lawsuits were consent decrees that mandated the agency take further regulatory action. And I would recommend that the committee take a look at the possibility of putting into law a requirement that agencies not enter into consensual agreements in a judicial process that drove further regulation by the agency without any legislative mandate coming from Congress.

I think that is an important aspect to keep in mind. We in the Reagan administration worked by order from the Attorney General to limit that effect. I think it would be a helpful thing to have this committee consider legislation that would also put that restraint on the agencies.

Again, in closing, let me thank you for having the opportunity to appear before you today, and commend you for the good work in this area. I am confident that by the time this committee has finished its work and Congress has concluded its consideration of H.R. 9 that Americans everywhere will have a better understanding that this Government is not going to overregulate, not going to interfere with their personal liberty, not going to create additional burdensome requirements in the regulatory process.

Thank you very much, Mr. Chairman.



[The prepared statement of Mr. McIntosh follows:]

PREPARED STATEMENT OF HON. DAVID M. MCINTOSH, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF INDIANA

I want to thank the distinguished Chairman for asking me to testify on Title VII, the "Regulatory Impact Analyses" component of H.R. 9. Your subcommittee has a key role in putting together a strong, comprehensive regulatory reform package. Know that your efforts here will actually begin to lighten the burden of excessive regulation from the shoulders of the American people.

Before I begin, I want to say that the opportunity of being asked to testify before your subcommittee on regulatory reform, an issue I toiled with for many years in the desert, is very sweet.

Title VII reforms the arcana of the Administrative Procedure Act, imposing substantial new constraints on the rulemaking authority of federal agencies. Title VII requires agencies to do a couple novel things: assess the impact of their rulemaking on the American people and open the rulemaking process—the executive branch equivalent of sausage making—to greater scrutiny. To make a good title even better, I respectfully submit to the Subcommittee the following areas that might be strengthened.

Based upon my experience at the President's Council on Competitiveness there are two basic things that are essential to reforming the regulatory process:

1. Centralized review of regulatory actions and
2. Judicial review of regulatory actions.

Section 7005, indicating the "Additional Responsibilities of (the) Director of the Office of Management and Budget," is a good idea and addresses the issue of centralized review. Centralized OMB review and veto power over major rules is an important provision to ensure uniform compliance with the changes we make here in Congress.

But I might also suggest that we offer judicial review of regulatory actions. Judicial review is important because it empowers regulated entities, through a civil action, to make sure that agencies comply with the regulatory reforms we enact on cost-benefit analyses, risk assessment and so on. An effort to open agency judgment to review would add teeth to H.R. 9.

Another issue that might be addressed by H.R. 9 is restricting the ability of federal regulatory agencies to enter into consent judgments with private party plaintiffs. Consent judgments allow agencies to tie their own hands, so to speak, and also those of its successors. This issue may be addressed by adding a new section to Title VII. A well crafted amendment dealing with consent judgments would prevent an agency from restricting its future discretion, particularly the discretion to lighten regulatory burdens.

I am deeply gratified that the debate on regulatory reform has come full circle. The sorts of changes suggested by the President's Council on Competitiveness may now be enacted in law.

Not surprisingly, the critics of our work at the Council, still do not understand what we hope to accomplish. Our efforts here are not first about asserting Congressional power over federal agencies, it is about making agencies more responsible to the American people.

I want to again thank the Chairman for his leadership and for the opportunity to testify before this subcommittee.

Mr. GEKAS. We thank you both for your appearance here and for your testimony.

We are going to defer to your schedules and to our time requirements by allowing you to leave now. However, one thing I would like to ask you to do, I am going to direct the staff to submit to you, following this hearing, the statements of witnesses that would be contrary to H.R. 9, or any of its provisions, or even if they are in favor of H.R. 9 where modifications might be proposed for your perusal and response to us before markup, so that we can take your answers into consideration to the questions raised by those who oppose or who would modify H.R. 9.

So with that, we will see you on the floor sometime later today.

Mr. MCINTOSH. Thank you very much.

Mr. FRANKS. Thank you.

Mr. GEKAS. Our next witness is Sally Katzen, the Administrator of the Office of Information and Regulatory Affairs, which is part and parcel of OMB. As we recall, and we can cite as Members of Congress numerous instances of involvement by OMB and by Ms. Katzen's office in the question of oversight of compliance and the requirements of our regulatory structure. We believe and we know that the testimony that we are about to receive will be in the best interests of our full consideration of H.R. 9.

You may proceed.

**STATEMENT OF SALLY KATZEN, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT**

Ms. KATZEN. Thank you very much, Mr. Chairman.

Mr. GEKAS. We want to note the presence of the distinguished gentleman from Rhode Island, the ranking member, Mr. Reed, and the gentleman from Illinois, Mr. Flanagan.

Ms. KATZEN. Thank you very much, Mr. Chairman and members of the subcommittee.

I listened to the first two witnesses discuss the regulatory system in the United States, and I agree with much of what they said.

This administration is on record: We have spoken frequently and forcefully about the need to improve the regulatory system. We have said that there are too many regulations; that too many of them are excessively burdensome; that many do not provide their intended benefits; and that consequently, many members of the public are frustrated and angry with the Federal regulatory system.

However, it was with regret that I say that the medicine prescribed by title VII will not restore the patient to health and, in fact, may cause a further deterioration of the condition.

H.R. 9, title VII, which is before you today, is designed to produce a more rational rulemaking process by increasing the opportunities for public involvement, focusing agency attention on the benefits, the costs, and the burdens of regulation, and requiring central OMB review. The administration supports all of these goals.

But the bill goes further, and I believe is subject to the same criticisms that many of you have leveled against the regulatory system; namely, its provisions apply too broadly; are too prescriptive and too costly. Let me cite a few examples in the time I have available.

Title VII imposes additional procedural requirements and a 23-step analysis for all major rules. Major rules are then defined as those that affect more than 100 persons or would require the expenditure of more than \$1 million by a single person.

This definition is at odds with the experience of the last 20 years. Since President Ford, every President has had an Executive order on regulatory review, and every President has used \$100 million as the threshold to distinguish between that which is significant and that which is not.

President Clinton's Executive Order 12866, which was not a departure from the spirit and the principles in the Executive order

signed by President Reagan, embraced cost-benefit analysis, embraced good data, embraced having agencies consider the consequences of their action. The specific provisions are all embodied in Executive Order 12866, it consciously retained the \$100 million threshold.

What is being selected here is one one-hundredth of the amount that President Reagan selected 14 years ago. When you add to that the 100 persons, there is no distinction between major and nonmajor. Yet one of the criticisms that has frequently been made is that we are not allocating our resources where we need to. We are not getting the biggest bang for the buck.

This definition of "major" precludes the kind of allocation of resources to do that which makes the most sense.

Think about regulations affecting 100 persons or \$1 million. Do we really want the Coast Guard to undertake a full regulatory impact analysis before it changes the times for opening and closing drawbridges in navigable waters? Do we want the Department of Agriculture do a full cost-benefit analysis before it promulgates rules designed to keep fire ants out of the country? The Department of Commerce, before it issues a rule opening a haddock fishery in the Pacific? The Federal Aviation Administration, before it requires airlines to inspect planes to ensure safety? The Food and Drug Administration, before it approves, not restricts, but approves a new sweetener for food? The Department of Education, before it announces an intention to conduct a small research grant competition? The Federal Bureau of Investigation, should it undertake a full-scale cost-benefit analysis before it raises the cost of obtaining a criminal history record by \$1, or the Department of Treasury before it issues any tax regulation? But that is what the terms of this bill as written would provide.

Now, particularly unsettling, in my view—and it is also, I believe, unwise—is the proposed codification of Executive Order 12291 signed by President Reagan 14 years ago as it was in effect on September 29, the day before President Clinton signed his Executive order. I have seen no analysis that points out where the former is better than the latter.

Indeed, when President Clinton signed his Executive order, it was greeted with universal acclaim. It followed extensive consultations with the public interest community and with business—big business, small business—Members of Congress and their staffs, Republicans and Democrats, State, and local governments. And it was greeted with universal acclaim as having advanced the ball. Now we are going to take a step backwards and codify in law something which had predated the Executive order.

In my written testimony I go through the 23-step analysis and I demonstrate how some of those matters are too prescriptive. It is not just a checklist. It calls for explanations, for statements, for descriptions. It is paperwork, more reports, more papers, that is at issue here.

We do not oppose cost-benefit analysis. I do that every day of my life. I look through rules. I review executive branch decisions to assure that agencies have considered the consequences of their actions. But not the way it is prescribed here.



There is no exception for emergency. There is no exception where there are preexisting statutory provisions that preclude some of these forms of analysis. There is no exception for when it is deregulatory rather than when it is regulatory. There is no exception for health, safety and the environment as opposed to international trade, national security, commerce. The list can go on and on, because regulations don't come in one shape, one size. Yet this is a one-size-fits-all.

I should also mention that when you are looking at title VII, you should look at title III as well. I testified on Thursday and Friday before the Science and Commerce Committee on title III. Title III is called risk analysis.

Steps 6, 7, 8, 10, and 11 of your 23 items duplicate what are in title III. They also duplicate some of the provisions which you have just added to the unfunded mandates bill. Is an agency to do this analysis twice, three times?

And there are differences. The thresholds are different, the cut-offs are different, the form of analysis is different. This bill says that these differences will be reconciled: Nothing in title VII is to be inconsistent with something in title III.

But how are those differences to be reconciled? Who is to make that call? And there are other provisions in here that I think are terribly important to focus on.

One provision calls for a public hearing where 100 persons are acting individually. What does that mean? For a letter campaign with a form letter or form postcard—are those people acting individually? Even if they have crafted their own letters, are they acting individually if their employer has asked them to write? Or their trade association?

And with judicial review, all of these questions will be decided not just in the executive branch, but by the courts as well. And this committee of all committees should be very sensitive to burdening the courts with second guessing these kinds of issues.

There are salutary goals set forth here. There are important goals. They are goals we subscribe to. But the way of implementing them is all wrong.

I would be happy to answer any questions you have on this. The written testimony goes on, probably in more detail than any one would care, but I thought it important to spend the time to identify some of the issues. We do not quibble with your objectives. We have strong problems with your solutions.

Thank you very much, Mr. Chairman.

[The prepared statement of Ms. Katzen follows:]

PREPARED STATEMENT OF SALLY KATZEN, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT

Good afternoon, Mr. Chairman and Members of the Subcommittee. I am Sally Katzen, the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB). I am pleased to be here today to discuss with you Title VII of H.R. 9, the "Administrative Procedure Reform Act of 1995." The Administration looks forward to working with you in the coming weeks and months as we both engage in efforts to improve our regulatory system.

Title VII's goal is to produce a more rational rulemaking process by increasing the opportunities for public involvement, by focusing agencies' attention on the benefits, burdens, costs, and consequences of their regulations, and by requiring central

OMB review of important new regulations. This is a laudable goal, which the Administration actively supports. Indeed, we have spoken frequently and forcefully of the importance of basing regulatory decisionmaking on good data and good analysis of costs, benefits, and risk, of the benefits of centralized regulatory review, and of the desirability of an open and transparent process. More importantly, we have done a great deal to put these ideas into practice, beginning almost immediately after we took office.

Executive Order No. 12866, which President Clinton signed on September 30, 1993, represents the cornerstone of our efforts. It recognizes that there is an important role for regulation in protecting the health, safety, environment, and well-being of the American people. At the same time, it emphasizes that Government has a basic responsibility to govern wisely and carefully, regulating only when necessary and only in the most cost-effective manner.

To implement this philosophy, the Order sets forth principles emphasizing the critical role of analysis (of costs, benefits, and risk) and of the use of that analysis in decisionmaking; consideration of different regulatory alternatives and of alternatives to regulation; the importance of private markets and the use of market incentives in regulating; the need for performance standards rather than command and control techniques; better consideration of the needs of small businesses and the roles of state and local governments; and the need for extensive consultation with all those affected by the regulation (both those who will benefit and those who will be burdened). The Executive Order requires agencies to propose or adopt a regulation only after determining that the rule would achieve its objective in a cost-effective manner, and that its benefits would justify its costs. The Executive Order also charges my office with reviewing all significant Executive Branch agency rules in order to ensure that its principles are satisfied.

The Administration endorses efforts to promote the use of regulatory impact analyses, including risk analysis and cost/benefit analysis. Risk and cost/benefit analyses are particularly valuable tools in helping agencies make decisions that would reduce risks to health, safety, and the environment in a sensible and cost-effective manner. The Administration therefore supports regulatory impact analysis legislation that is fair, effective, and affordable. But we do not support legislation that is likely to burden the regulatory process with unnecessary or costly requirements that will cause delay and gridlock.

We have reviewed Title VII of H.R. 9 and very much regret that it does not appear to live up to these standards, nor to its own professed standards of regulatory efficiency, cost-effectiveness, and clarity. To the contrary, as drafted, Title VII is an extreme measure, fraught with consequences, we assume unintended, that threaten to impede, entangle, and further bureaucratize functions of government that it is hard to believe any of us would want so obstructed.

Title VII would change the rulemaking process in two principal ways. First, it would amend the Administrative Procedure Act (APA) to add an additional series of procedural requirements, including advanced notice of an intention to propose a rule and public hearings, to the informal rulemaking process. Second, it would enact into statute a requirement that agencies prepare a detailed, 23-step regulatory impact analysis, which would be reviewed and approved in writing by OMB, before proposing or promulgating virtually all rules.

The most obvious problem with Title VII is its scope. Both its advanced notice and public hearing, and its extensive regulatory impact analysis requirements apply to all "major rules." Major rules are then defined as those that "affect more than 100 persons" or that would "require the expenditure of more than \$1 million by any single person which is not a Federal agency."

This definition is at odds with the experience of the last 20 years. Since President Ford, every President has had an executive order establishing regulatory review. An essential ingredient of these orders is a distinction between that which is important and that which is more routine or administrative. For over 20 years, that distinction has been drawn at an aggregate annual effect on the economy of \$100 million.

In developing Executive Order No. 12866, the Administration consciously retained \$100 million as the threshold for requiring a cost-benefit analysis, having determined that the resources devoted to regulatory analysis should be commensurate with the significance of the decision to be made. Allocating resources where they are most productive (i.e., getting the biggest bang for the buck) is a tenet of the proponents of cost/benefit analysis. But by setting the threshold for such analyses at one one-hundredth of what President Reagan had used in his Executive Order (which is otherwise codified as part of this Title), and by adding a new trigger of affecting over 100 persons, Title VII collapses any distinction based on significance. Indeed, the effect of Section 7004's definition of "major" is to sweep nearly every rule, no matter how trivial, into Title VII. We are hard pressed to come up with

an example of a rule that does not affect at least 100 people, since rules by definition are designed to have broad application. And even focusing on the dollar threshold alone, we note that it would include a rule that affects only a single large company in the amount of \$1 million, but would not capture a regulation that affects 99 small companies \$10,000 each.<sup>1</sup>

The consequences of this change of scope are very real. For virtually all rules now, there would be procedural and paperwork requirements that can only cause delay and gridlock. These requirements are costly; some cost/benefit analyses cost over \$1 million. Do we really want the Coast Guard to undertake a full regulatory impact analysis before it changes the times for the opening and closing of drawbridges or establishes navigational areas? The Department of Agriculture, before it promulgates rules designed to keep fire ants out of the country? The Department of Commerce, before it issues a rule opening a haddock fishery in the Pacific? The Federal Aviation Administration, before it requires airlines to inspect planes to ensure that safety is maintained? The Federal Emergency Management Agency, before it makes changes to grants for disaster victims, or technical changes to flood maps? The Food and Drug Administration, before it approves the use of a new sweetener in food? The Department of Education, before it announces an intention to conduct a small research grant competition? The Federal Bureau of Investigation, before it raises the cost of obtaining criminal history records by \$1? The Department of the Treasury, before it issues any regulations clarifying the tax code?

At this point, it may be useful to be clear about what is driving this debate—namely, regulations. Some say regulations are all bad; others say they are all good. In fact, they are not *inherently* good or bad. They have the potential to be either. Nor are they inherently pro- or anti-business. Well chosen and carefully crafted, they can protect consumers from dangerous products, assure equal access to markets, limit pollution, govern operation of our prisons, prevent discrimination, control immigration, provide uniform interpretations of customs and export/import laws, protect workers, and ensure that Americans have information to make informed choices. Excessive or poorly designed, however, they can cause confusion and delay, generate unreasonable compliance costs, retard innovation, reduce productivity, or distort private incentives.

Some regulations carry out legislative policies, agreed to by previous Congresses and signed by Presidents from both parties. Several of these policies were or are controversial, and they can and should be debated on their merits, not retarded or advanced through the guise of procedural requirements. Equally important is the fact that in other cases, regulations are routine, administrative or ministerial, and uncontroversial. These regulations unobtrusively serve the public day in and day out, and are seldom included in what most people mean when they argue about whether regulations are good or bad. Examples of this category of regulations include rules that establish traffic lanes for airplanes; reporting requirements to help trace money laundering from the drug trade; eligibility and timing requirements—as well as financial accountability practices—for small business, and other loan programs; safe practices at nuclear power plants; and quarantine areas to prevent the spread of pests such as the medfly.

To be sure, the current regulatory system—which has been built up over the past five decades under both Republican and Democratic administrations—needs improvement. This Administration has stated (well before the election—indeed, since its inception) that there are too many regulations, that many are excessively burdensome, that many do not ultimately provide their intended benefits, and that, consequently, many members of the public are justifiably frustrated and angry with the federal regulatory system. However, the medicine prescribed by Title VII will not restore the patient to health, and may in fact cause his condition to deteriorate.

Particularly unsettling, and in my view unwise, is the proposed codification of Executive Order No. 12291, signed by President Reagan 14 years ago, “as in effect on September 29, 1993,” the day before President Clinton signed his Executive Order No. 12866, “Regulatory Planning and Review.” As noted above, there has been a long history of presidential executive orders on this subject, and just as President Carter’s Order No. 12044 built on what his predecessors had done, so President Reagan’s Order No. 12291 built on its predecessor. President Clinton’s Executive Order does the same, having chosen those aspects of the previous order that had been successful in improving the regulatory process and discarding those that were not. Two changes, in particular, drew favorable comments: one was to limit our review to significant regulations, so as to focus our resources where they would have the most

<sup>1</sup>This bias toward large corporations is inconsistent with the concerns underlying Title VI, which recognizes the special needs of small businesses.



impact; the second involved the incorporation of openness and accountability procedures that made the review process more transparent.

President Clinton's Executive Order was developed after extensive consultation with individuals from both parties, with representatives from the public interest community and the business community, with individuals from state and local government associations, and with the staffs and members of Congress. It is significant, we believe, that President Clinton's Executive Order was greeted with universal acclaim. Under these circumstances, there is no justification for reestablishing President Reagan's Executive Order, unless it is for partisan political purposes.

I would note, moreover, that it is not at all clear how much of the former Executive Order is to be codified. There is a reference in Section 7004 of Title VII to the Order as it relates "to Federal regulation requirements and regulatory impact analysis." As you know, there are aspects of the Executive Order—including, for example, provisions regarding the effectiveness of regulations issued by President Carter—that are clearly overtaken by events. Are these provisions meant to be codified, and if so, why? This is not an idle question, for it raises the more fundamental issue of whether a President's Executive Order—any President's Executive Order—should be lifted verbatim and placed in a statute. Presidents use executive orders to infuse their policies into the management of the Executive Branch. A hallmark of an executive order is its flexibility; an executive order can be changed far more easily than a statutory provision. As the history of the series of executive orders on regulatory review indicates, each President can impose his own stamp on the process and in so doing incorporate needed improvements. To codify the detailed provisions of any executive order would be a disservice to his successor.

This is particularly true where, as here, the heart of Executive Order 12291 is the recitation of the contents of a regulatory impact analysis, which are either augmented or superseded by the list of 23 requirements for a regulatory impact analysis set forth in Section 7004(c). This is quintessential command and control, rather than a performance standard—which is one of the criticisms many of the proponents of this legislation have legitimately leveled against the current regulatory system. It would be better if we could learn from our past mistakes rather than repeating them.

Before leaving Executive Order 12291, I would note that it, like all of its predecessors and its successor, precluded judicial review of agency compliance with, or implementation of, its provisions. This Committee, in particular, should be sensitive to the vital importance of including an express preclusion of judicial review in whatever bill you report that relates to the management of the regulatory process.

The 23-step analysis in Section 7004(c) is not only highly prescriptive, but it is also cast as a one-size-fits-all requirement. There are few, if any, distinctions between regulations that impose burdens and those that relieve regulatory burdens or that bestow benefits in the form of grants, loans, contracts, etc. There are few, if any, exceptions for preexisting statutory provisions governing the factors to be considered in developing regulations. There are few, if any, exceptions that reflect the not infrequent need to take emergency action. There are few, if any, distinctions drawn between regulations affecting health, safety, and the environment, and those involving commerce, international trade, or national security. The list could go on and on, for as noted above, regulations come in all shapes and sizes and exist for a variety of different purposes. A one-size-fits-all regime, especially one this detailed, does not make any sense.

In considering the 23 requirements for regulatory impact analyses, it is important to recognize that although Title VII alone is before this Committee, it is only one piece of a larger bill. Last Thursday and Friday, the Administration testified before the House Committee on Commerce and the House Committee on Science on Title III, "Risk Assessment and Cost/Benefit Analysis For New Regulations."

Title III requires each agency, before proposing or issuing "major" rules, to undertake risk and cost/benefit analyses in a highly prescribed manner. There is obviously substantial overlap between Title III's risk and cost/benefit analyses and the regulatory impact analysis prescribed by Title VII. Indeed, steps 6, 7, 8, 10, and 11 in Section 7004(c), which cover cost-effectiveness, cost/benefit analysis, and risk analysis, all duplicate to a great extent the analytical requirements of Title III. While Section 7004(c) states that its requirements shall be "consistent with" Section 3201 of Title III, the truth of the matter is that Titles III and VII treat these same subjects in different ways. For example, Titles III and VII have quite different definitions of "major" rules, and while Title III requires that the benefits of a proposed regulation "justify" the costs, Title VII specifies that the benefits must "outweigh" the costs. How are these differences to be reconciled? Apparently, Title VII cannot satisfy its own Section 7006 "Standard of Clarity" requirements.



Section 7006 requires that the Director of OMB certify before approving the promulgation of a regulation that it is written simply and in an understandable manner, that its sentences are short and well-organized, that it does not contain double negatives, confusing cross references, convoluted phrasing, or unreasonably complex language, and that it "conforms to commonly accepted principles of grammar." I am a firm believer that there should not be unclear antecedents, that the possessive should be used with the gerund form of the verb, and that one should use an adverb to modify a verb or an adjective. Regrettably, some people say "real clear" instead of "really clear." These kinds of issues are important to some, but are they as important as the bill suggests?

As noted above, Title VII also breaks new legislative ground by adding several new requirements to the informal rulemaking provisions of the APA. Section 7002 requires, for all "major" rules, that an agency publish a notice of intent to engage in rulemaking at least 90 days before it publishes its Notice of Proposed Rulemaking (NPRM). This pre-notice notice must contain an explanation of the "necessity, appropriateness and reasonableness of the rule," a "description of the current condition that the rule will address and how that condition will be affected by the rule," and a description of "any alternative approaches considered by the agency or suggested by interested persons and the reason for their rejection."

Section 7003 requires an agency to extend its comment period by 30 days, both after the notice of intent and after the NPRM, as well as to hold public hearings, if more than 100 persons, "acting individually," submit comments to the agency on a proposed rule. It is not clear what kind of "hearing" the agency would have to hold, although given the construct of the APA, we are assuming that it is not a Section 556-557 hearing, with all its formal procedures. Title VII also requires agencies to respond to the substance of all comment submitted. How specific must the response to the comments be? There is a very large body of case law that has developed on this subject. Is this provision intended to add to or delete from the existing jurisprudence?

Moreover how would an agency interpret the "acting individually" requirement? We have all been the subject of letter writing campaigns. In some instances, it is clear that the commenters have crafted their own letters. In others, it is equally clear that either a form letter or postcard has been provided. In the latter case, are the commenters acting individually? Indeed, in the former case, are they acting individually if they have been urged to write letters by their employer? By their trade association? Again, the specter of judicial review makes the answers to these questions nontrivial, and again, this Committee should be sensitive to burdening the courts with the task of second-guessing the agency's determination as to the individuality of a set of commenters.

In evaluating the desirability and likely effect of the many procedural requirements that would be added to the rulemaking process by Title VII, it is important to bear in mind the debate that took place in the late 1930s and early 1940s. Many, fearing the potential for agency arbitrariness, advocated setting all regulatory policy by way of rules made through a single, highly prescribed and formalized process. Others, fearing that too rigid a process would retard the necessary implementation of important legislation and the development of expertise, sought to place no across-the-board procedural requirements on agencies, leaving them free to adopt the procedures they felt were best suited to their regulatory missions.

The APA, passed in 1946, sought to strike a balance between these two positions. Those involved in its drafting recognized the difficulty of creating "methods of democratizing the rulemaking process without, at the same time, imposing such burdensome requirements that rules will either not be made or policy will be driven underground, as it were, and remain inarticulate or secret."<sup>2</sup> They therefore created the process of informal rulemaking, which imposed some basic requirements on all agencies, but otherwise left them to implement their statutory directives and respond promptly to pressing public needs as they saw appropriate.

The changes proposed in Title VII would move these proceedings far beyond what they were intended to be. That is a course you may wish to take, but it is one that should not be taken lightly. Should you choose to transform the process in this way, it is my hope that you do so after full consideration of the consequences of the changes that would be made.

Although I have reacted negatively to much that now appears in Title VII, I remain confident that we will be able to work together to help bring the American people a rational regulatory system that works for them, not against them, and that

<sup>2</sup>Report of the Attorney General's Committee on Administrative Procedure (Minority Report), p. 224 (1941).

improves our quality of life, promotes our health and safety, and protects the environment, without imposing undue costs or burdens.

Thank you, Mr. Chairman. I am happy to answer your questions.

Mr. GEKAS. We thank you for your testimony.

We want to assure the lady that insofar as title III and title VII and other features of the total bill under Contract With America on regulatory flexibility conflict with one another or overlap, that it is the jurisdiction and duty of this subcommittee and the Judiciary Committee to reconcile those differences and to put into proper provisions something that works for all. Therefore, your comment is well taken, but it won't stop me from trying to pursue regulatory flexibility reform as are others I think are in the same frame of mind. But insofar as there is this overlap or conflict, we intend to resolve those conflicts.

Ms. KATZEN. I raised that point because during my testimony before the Commerce Committee, many of the Members had not been aware of title VII at all, and I thought it was important.

Mr. GEKAS. Well, we who are aware of title VII are aware of title III. I want you to know that.

In any event, you said something to the effect that after the current President signed his Executive order in September 1993, that there was dancing in the streets, practically. That is how exuberant you were that he covered all of the bases and everybody was happy and satisfied. Yet, we have hundreds of anecdotes since then and interested witnesses here today to wish us well in our efforts to modify the Reagan, Bush, and Clinton Executive initiatives on all of this.

How do you account for that?

Ms. KATZEN. The regulatory system has been built up over at least four or five decades. It did not happen overnight, and it will not be solved overnight.

The chocolate manufacturer that Congressman Franks spoke about was not during our term; it was during an earlier administration. And those kinds of issues do surface from time to time.

We just dealt with asbestos, as a result of a rule by the Department of Labor which was concerned very much about asbestos exposure when people are fixing roofs. We specifically brought EPA into the room, which has its own asbestos rule. We sat there and worked with the agencies until they were able to assure that there were no conflicts or inconsistencies like the chocolate manufacturer had to deal with DOL and FDA. We have been working on that. But we will not solve it overnight.

Mr. GEKAS. That is admirable. That is what we want you to do. But what is your objection to incorporating something in a statute that leads every agency to—

Ms. KATZEN. I have no objection to a statute, I have no objection to a statute that sets forth the objectives—the principles—and provides the agencies the wherewithal to carry them out. What I have objection to is codifying an Executive order which has not been in effect for the last 2 years, that had unfortunately engendered much controversy and criticism because of its methods of operation.

One of the things in the Clinton Executive order, if you want to incorporate good principles, is openness, accountability, trans-

parency. We put that in the Executive order so that the public would know what is happening.

I have meetings in my office with people from the business communities all the time. It is on the public record that they have met with me and what issues they are raising. These are the kinds of issues where I think instead of looking to the past, we should look and take what is the best of the present. We should write it as, if you will forgive the lapsing into regulatory jargon, a performance standard, not command and control. You want to tell us where we should be, not how to get there.

If you set forth principles, we would be happy to work with you in both crafting the language and in endorsing a bill that sets forth a workable, fair, effective, affordable system of executive oversight.

You have said in here that OMB should review regulations. That is what I do. I have no problems with that. My problems are in the details here.

Mr. GEKAS. Well, we will spare you a lot of the details. But if we do in the final analysis impose those details, it is because the hue and cry of the business community, the job creators, the wage-enhancers, the people who stimulate our economy and elevate our standard of living have demanded us to do something about bettering their system of operation.

We think that even though you seem to decry a little bit their access to the courts or their access to the openness which you endorse, we want to do everything we can to give them access to the bureaucracies and to the legislature and to the courts where necessary. I don't think you disagree with that. I think it is the methodology that we are espousing.

Ms. KATZEN. It is a means to the end. We have no dispute. There is common ground in defining the ends, yes.

Mr. GEKAS. I would yield to the gentleman from Rhode Island for the sum of 5 minutes.

Mr. REED. Thank you, Mr. Chairman.

Thank you very much, Ms. Katzen, for your testimony.

I think one of the issues here is using resources wisely. And, as you point out in your testimony, under the current definition of major, 90 percent of the rules or more—ranging from lowering and raising drawbridges to dealing with serious emergency threats to public health—would require all of this multiple step analysis. Is that something that is an inherent flaw in your view in this approach to regulatory reform?

Ms. KATZEN. It is, indeed. The \$100 million threshold was first used by President Ford in 1974. The \$100 million in 1975 is now through inflation \$35 million. By keeping the threshold at \$100 million, we are really talking about a very, I think, important line.

Mr. REED. Let me take another tack on the same issue. Another way a rule could be considered a major rule is if it impacts 100 independent individuals. But you raised the question, well, what would stop a business from essentially asking 100 employees to write in? And I would assume under the first amendment they have every right to ask their employees to contact their Government. That way, I would assume it would be presumably sufficient to cause a public hearing and to trigger all of the requirements and maybe even judicial review of the rule. Is that your analysis, too?



Ms. KATZEN. Yes, it is.

Mr. REED. And that essentially could stop a rulemaking process dead in its tracks.

Ms. KATZEN. It provides for additional extensions of time. It provides for a public hearing.

It is not altogether clear what a public hearing is. I taught administrative law for a number of years while I was in private practice, and I am assuming it is not a section 556-557 hearing. But, nonetheless, it is some construct that goes well beyond what the section 553 informal rulemaking proceedings set forth in the APA envision.

Mr. REED. When President Reagan promulgated his Executive order, he deliberately excluded judicial review. Because of that, I think he felt, speaking collectively, that he could be very, very prescriptive, because his Executive order was a template of what you should do in the regulatory process.

But here it appears they are lifting whole cloth the Reagan Executive order, but taking out a very critical piece that made the mechanism work, which was the exclusion of judicial review. Instead, H.R. 9 requires judicial review. Do you see this as, again, a tension that is destructive overall to regulatory rulemaking?

Ms. KATZEN. I think it is, and I think President Reagan's decision not to have judicial review was a sound one. It was influenced in some small part by the fact that these types of provisions should be used—and under the APA must be used to go through a rule-making proceeding when you are deregulating, just as when you are regulating. If you are getting rid of a regulation, you can't just snap your fingers; and it is gone. You have to have notice, comment and all of the other APA proceedings.

If you add to that the procedures set forth here and then judicial review, our attempts to deregulate will be very much slowed down. And I think this was one of the considerations he had.

He was also advised, I think by sound legal scholars, that this is not an area where the courts are particularly productive. Courts will typically defer to the discretion—wholly apart from the *Chevron* decision—courts will defer to the agencies on these types of issues,

So by opening up the courts, all you are doing is giving the tax protestor or some other person who wants to impose gridlock or delay another avenue. And so, for that reason, President Reagan declined to have judicial review, and I think that that is a terribly important feature.

Mr. REED. And your point, this would apply to attempts to deregulate, to remove regulation so that people could try to maintain the status quo by using adroitly this mechanism of regulatory impact analysis.

Ms. KATZEN. Yes. And it is important to note that for every regulation, someone's ox is being gored. Every time you hear about a regulation that you don't like, somebody else likes it, and vice versa. Getting rid of regulations, there is somebody who wants to keep it.

And it is like many of the issues that you have before you. Some will approve; some will disapprove. And the decisions have to be made on a full record.



But when you give anybody affected an opportunity to come into court, you are saying that it is going to greatly delay the ability to implement any of these ideas.

Mr. REED. One final question. You are a supporter of cost-benefit analysis, but one of the very difficult things is quantifying the cost and quantifying the benefits. And, as I read this proposal, in every case you would have to do that.

And there are examples, for example, a situation recently in Milwaukee with the drinking water, where there are certain bacteria that the EPA really knows very little about it, doesn't know how much is harmful to human beings, et cetera. As I read this, they would have to—before they could promulgate a rule—they would have to do elaborate research and analysis to come up with a reasonable benefit analysis before any type of rulemaking which would delay their action. And one would argue when people die of a pollutant in the water, that is an emergency and we should not tolerate delay. So is that a fair estimate, in your view, of what could happen in a situation like this?

Ms. KATZEN. Typically, those who work in the cost-benefit field are of the view that costs are more easily monetized or quantified than benefits. How do you put a dollar value on a human life?

We know about cryptosporidium in Milwaukee, that a number of people died and got very sick. There is a certain cost—there is a lack of productivity even while you are out sick. There are medical costs that are involved. But the art and the science of doing cost-benefit analysis has traditionally placed more emphasis on the definition of costs.

Now, in the Clinton Executive order, we sought to specifically acknowledge this, and say that an agency must consider the costs and must consider the benefits, that the costs are to be considered whether they are quantified or not quantified; so, too, the benefits. You have to have a qualitative interpretation. There you have some judgment.

And you will note in title III that it talks about benefits justifying the costs. Here in title VII it is benefits outweighing the costs. Well, once you get to outweighing, it sounds like it is precise. It sounds like it can be quantified. And these things I think are much more difficult to reduce to numbers. Whereas to have benefits justify the costs, you can have an evaluation of what is at stake and then whether it seems to be worth it.

Those are minor technical issues here that will become important if it is put in law, and certainly they will become important if there is judicial review.

Mr. REED. Thank you. Thank you, Mr. Chairman.

Mr. GEKAS. We now acknowledge the presence of the gentleman from Georgia, Mr. Barr. And we would now yield 5 minutes to the gentleman from Ohio if he wishes to take advantage of it.

Mr. CHABOT. I will pass.

Mr. GEKAS. Mr. Scott from Virginia is recognized for 5 minutes.

Mr. SCOTT. I just have one question.

What additional expense is there on the bureaucracy to do all of this? You had indicated some fairly innocuous regulations that presumably can be done without a whole lot of expense. What expense is there on the bureaucracy to go through the hoops in those?

Ms. KATZEN. A rigorous cost-benefit analysis can cost upward of \$1 million. Now, I can't imagine that you would want to do that kind of an undertaking for quarantining the medfly or any of the other items that I mentioned on this list that are not even susceptible to a cost-benefit analysis. But one of the aspects of cost-benefit analysis is that the less data you have, the more costly in some respects it is to gather the information that you may need to have.

In response to Mr. Reed's questions I was saying that some things are not easily monetized or quantified. If that is the case, then searching for that data will not solely be a cost for the agencies. The cost ultimately will come back to business, and this is something which I think bears emphasis here.

If the FDA wants to approve a new product and it has to get certain types of information that it does not have in its files, it will have to ask business to provide that as the price for getting its application processed. So the request for the information is not solely an administrative or governmental cost. Business will ultimately be asked to pay that cost. And I think that is inconsistent with what we are trying to do and with having a leaner, more efficient, more effective government.

Mr. SCOTT. Now, how many rules are made that affect less than 100 people?

Ms. KATZEN. I don't know. There are a lot of gross numbers that are used. Over the next year, there is something like 7,000 rules or regulations of some sort that would be acted on. Many of those are notices of a hearing, notices of availability of documents, air-worthiness directives and the like. In terms of the number of serious rules that you and I would think of if we used the term "regulations," probably much less than 1,000 and perhaps even appreciably fewer than that.

But if you have a notice of a grant that is going to affect more than 100 people it would be covered. A "rule" as defined under the APA as having broad applicability. Therefore, if it is affecting fewer than 100 people, you would probably go to adjudication or some other method by proceeding.

By definition, someone used the term 90 percent, but I would tend to think it would be even higher than that.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. GEKAS. Do any other Members seek recognition?

The gentleman from Illinois is recognized for 5 minutes.

Mr. FLANAGAN. Thank you, Mr. Chairman.

And thank you, Ms. Katzen, for coming and enlightening us today. I have two questions.

First, the current threshold is \$100 million; and you very loudly commanded that it should remain at least at that threshold, if not perhaps higher. Considering the 1975 evaluation of \$100 million and the evaluation of it today or amounts that have an aggregate impact of less than \$100 million today, what lesser regulation do you have to make sure that the same goals are achieved?

Ms. KATZEN. That is a very important question and one that we wrestled with when we drafted the Executive order. Our threshold is \$100 million or a significant impact on a sector of the economy. Because you could have a sector of the economy that is \$50 million, in which case if it was a \$35 million regulation, that would be very

significant. Writing it for an Executive order, one of the advantages is that you have some flexibility. And we will ask agencies to submit those that fall below \$100 million, if they have a substantial impact on a particular sector.

We also ask to review any regulation or proposed regulation that has a significant on-budget effect, so that some of the eligibility for Medicare and VA loans or VA benefits or educational or small business loans, those will come through as well, if they have an on-budget impact.

Another one of our criteria is if an action taken or proposed by one agency would have an adverse affect on another agency, the chocolate maker syndrome. We want to particularly focus on those proposals, and we will call those in as soon as we hear about them.

And if an agency puts out a notice of proposed rulemaking and someone comes in and says, this is inconsistent with a rule of another agency, we are one of the first to know; and we will ask to have that brought in.

With respect to those that we do not review, we have created something called a regulatory working group, which is the senior regulatory policy official in each of the agencies. We meet with them monthly, and we go through cost-cutting issues. And we talk about establishing within the departments and within the agencies a screening process that mirrors what we do at OMB.

Some of them have done really very well. The Department of Transportation does this through their Office of General Counsel. The Education Department does it through their Office of General Counsel. The Department of Interior created its own Office of Regulatory Affairs to do this kind of work.

And then we randomly sample what we see in the Federal Register to check to see whether there is something untoward happening. We have been very gratified that there has been little, if anything, slipping through the net.

One of the ways we hear about overzealousness or inconsiderateness by the bureaucracy is we will get letters, either directly from affected individuals, or from Members of Congress. Or I will read about it in the newspaper. We will then track it down and say what is going on here? So we have less than a systematic but nonetheless fairly comprehensive approach.

But you have identified something which I think is important. The issue is allocation of resources. Do you want to devote all of the attention on what is important? I mean, when you change from daylight savings time to eastern standard time, someone has to say when it happens and when the railroads start and stop. That is done by regulation, but you don't want to have all of this analysis for that, ordinarily.

Mr. FLANAGAN. And that brings me—through your commentary now—you have illustrated the problem I believe that business has. You have identified a problem, as has the author of this legislation as well and this subcommittee's hearing on it. This is why your testimony is extremely valuable, because there are ways in which this is looked at, but they are clearly inadequate because we have the chocolate maker, as you know, and others. Now we are wrestling with the problem—going to the other extreme—working out daylight savings time and what not.



If, given the opportunity—and you have it here—how would you change what you see here to accomplish the goal that needs to be accomplished without dismissively permitting you or other agencies—I should say, not you particularly, but other agencies—to just go ahead and do it where it isn't being done right now or at least not well enough?

Ms. KATZEN. I think that I would take the objectives of title VII and I would craft them as performance standards. I would have guidelines which would have to be written to bring these about through notice and comment.

One of the virtues of rulemaking—and this is what the APA sets forth—is notice and comment. When you issue a proposal, people are to comment on it.

People get very agitated because in the past, at least during the last administrations, there would be a proposal, there would be comments, the comments would be ignored and the proposal would be adopted. What we have been doing is assuring, when the comments come in, that they are considered and that we respond to them. This is the democratization—small d—of the process that I think is essential and that I want to encourage.

I would be very happy to work with the staff to try to craft some performance standards or objectives and the minimalist procedures to assure that they are carried out. I think that is doable, and that this administration would support such legislation.

The timetable that you have and the speed with which we are going through this gave me very little time to write 15 pages of testimony pointing out problems. I wish that I had been able to spend those 4 days over the weekend in the snowstorm drafting legislation instead.

That is what the administration has been saying from day one. There is common ground. We want to work with you. We would like to be able to sit down and stress where we agree rather than where we disagree. Because there are problems, and the regulatory system needs to be improved. We want to work in that direction as well.

Mr. FLANAGAN. As do we. And I thank you for coming today.

And I thank you, Mr. Chairman.

Mr. GEKAS. Do any other Members seek recognition?

The gentleman from Georgia, recognized for 5 minutes.

Mr. BARR. Thank you, Mr. Chairman.

I was interested, Ms. Katzen, in your remark telling us where we should be, not how we should get there.

It seems to me that just a couple of weeks ago, the administration was very critical of some action we took up here in the Congress on the balanced budget amendment because we didn't cross every T and dot every I in advance and that we didn't tell the American people precisely, exactly the roadmap we should use. So I am finding that Washington is not, in the short time I have been up here, a town of consistency.

I think your last remarks illustrate fairly, quickly to me that really what you are interested in is maintaining the status quo. The process that you set forward and the predisposition simply to handle it through the executive branch which I think is really the problem.



Your vehement opposition to judicial review leaves me a little perplexed. Is there not some way that we could fashion some judicial review, even setting certain thresholds? For example, we heard from some witnesses last week when we began these hearings that were interested in working with us to see if we could fashion something that would provide for some sort of judicial review, maybe not comprehensive, all-encompassing judicial review. Is your opposition to it such that you don't think that there is any way that we could work on that? Or are you just absolutely opposed to any judicial review in this area?

Ms. KATZEN. Well, I think I better be very careful how I answer this because, apparently, in my enthusiasm—and I do speak enthusiastically about most things—I failed to convey to you that I am not asking for the status quo, and I am not saying—

Mr. BARR. I know you are very careful to say that, but in your response to Mr. Flanagan's question that is, very frankly, what I am hearing.

Ms. KATZEN. Well, let me state it once more. I said this administration would support fair, effective, affordable, legislation in this area, and that I would be happy to work to craft such legislation. While I believe our Executive order is working, I understand the sentiment of the American people who after four or five decades do not believe that it can be solved that way, and I am not "vehemently" opposed to any legislation in this area.

Insofar as the judicial review provision is concerned, it is my view, again having taught administrative law and having looked to see what the courts do, that it is not productive in this area.

Would I vigorously oppose any and all form of judicial review? No. I would like to see what emerges from the consideration of this committee and of the rest of the Congress on H.R. 9. But we have a series of issues before the Congress and, just as it is true that there is not a program for every problem, so, too, vesting the courts with jurisdiction to sort through each and every issue that the legislative branch and the executive branch wrestle with is not productive.

We have three branches of government. They have different functions. And the courts have assiduously resisted being dragged into this area of the regulatory morass on these types of issues. For us to now endow them to do that, it seems to me, is to go against so much of what even the most conservative, traditional, restrained justices and judges appointed in the last 12 years would argue in favor of. That is all I was saying.

Mr. BARR. Thank you.

Mr. GEKAS. Would the gentleman yield for just a moment?

Mr. BARR. Certainly, Mr. Chairman.

Mr. GEKAS. I just wanted to emphasize that the Vice President and others in the administration have endorsed some form of judicial review, as I recall.

Ms. KATZEN. That is with respect to the Regulatory Flexibility Act, which is what you heard testimony on last week, I believe. There again, this was not right out of the box. The Reg Flex Act has been there a number of years. It has not worked as effectively as we think it should, so we have endorsed judicial review and have said that the questions are who is to have standing, is it big

business or is it small business; when are they to bring suit what relief is to be granted? Those are questions that should be asked and that is why we are not vehemently opposed to all those.

Mr. GEKAS. We will ask them. We thank you very much for your cogent testimony and we invite you to submit to us a proposed bill to do the things that you feel can be reasonably done on a joint basis.

Ms. KATZEN. I would be happy to work with your staff as you proceed forward. Has markup been scheduled on these particular provisions?

Mr. GEKAS. No.

Ms. KATZEN. Thank you.

Mr. GEKAS. Our next panel is made up of the following witnesses: Cornelius Hubner, chairman and chief executive officer of the American Felt and Filter Co. of Newburgh, NY. He has been the chairman of the American Felt and Filter Co. for the past 14 years. The company has manufacturing plants located in New Windsor, NY, and in Westerly, RI.

Mr. REED. My district.

Mr. GEKAS. Yes.

Mr. Hubner is also director of the Executive Committee of the United States Business and Industrial Council, a graduate of Georgetown School of Foreign Service and served in the U.S. Army from 1943 to 1946.

With him is Brian Maher, president of Maher Terminals, Inc., Jersey City, NJ. Maher Terminals is one of the largest privately owned businesses operating in the Port of New York and New Jersey and provides services and personnel for, among other things, the loading and unloading of products of ships, which carry goods and international trade to and from U.S. ports.

And on a personal note, I welcome a constituent, Mr. Al Wenger, the executive officer of Wenger Feed Mills of Reams, PA. Lancaster, PA is a suburb of Reams, I want everybody to know, and Mr. Wenger is a 1968 graduate of the University of Delaware where he received his degree in agricultural economics. He holds a master's in agricultural science, marketing economics from Cornell, and beyond that he has extensive experience in business and is chairman of the Egg Association of America.

And lastly, Mr. Ed Dunkelberger, who is an attorney in private practice in the Nation's Capital, who is also the general counsel for the National Food Processors Association.

So, who wants to lead off? All right, Mr. Hubner.

#### **STATEMENT OF CORNELIUS E. HUBNER, CHAIRMAN AND CEO, AMERICAN FELT AND FILTER CO.**

Mr. HUBNER. Good afternoon. My name is Cornelius Hubner, chairman and executive officer of the American Felt and Filter Co. headquartered in Newburgh, with plants in New York State and in Rhode Island.

I thank you for the opportunity to testify on behalf of my business and as a director of the United States Business and Industrial Council. The summary of our testimony is that requiring regulatory impact analyses will be an important deterrent to unnecessary new government regulations. We support title VII of H.R. 9, but we be-

lieve that the definition of the threshold for these analyses is not set low enough. We believe that RIA's should be required for all new regulations. Moreover, to encourage the rollback of some of the existing overregulatory burden, we strongly urge that the RIA's be completed on all current regulations.

We also urge that the Government be required to prepare all regulatory impact analyses accurately.

Title VII requires the Government to complete a regulatory impact checklist for all new major regulations. This is a beneficial and long overdue change, and we agree with the drafters of the Contract With America that every major new government regulation should be required to withstand a simple new test: Does it provide the general public with benefits worth the cost to small business in order to comply with it?

Moreover, we agree that Government regulators must be forced to publicly report the cost of new regulations to those affected and the taxpayers.

As good as title VII is, it does nothing to roll back the many already excessive government regulations which are already in force. If not one new regulation was ever promulgated in the future, business would still be overburdened, frustrated, and hamstrung with the present sorry conditions of regulations and enforcement procedures. Rollback provision is urgently needed.

The most important checklist item in title VII is the cost versus benefit analysis. But just having to do a cost versus benefit analysis is not enough. Committee members need to be sure that Government agencies are forced to produce accurate cost versus benefit analyses. Government agencies should be forced to carry the burden of proof of accurately estimating the cost they are passing on to consumers and taxpayers.

Unfortunately, no provision exists in this legislation to hold agency regulatory writers accountable for the poor decisions they have already made in already existing regulations. This explosion of laws and regulations have trapped us in mindless bureaucracy, robbed us of initiative and enterprise, and wasted incalculable time, energy, and money. The excess of regulations and bureaucracy has the same result as the dreaded central planning of Communist countries. It stifles common sense, efficiency, and individual responsibility. Because of this, we have built a legal monstrosity unprecedented in the history of civilization. In fact, even more stringent requirements could be written into the legislation requiring regulatory impact analysis statements.

The committee could reduce the threshold of affected persons from 100 or to 50 or 25 and reduce the threshold of expenditures from a million dollars to \$100,000. Ideally, a regulatory impact analysis should be done every time a new regulation, however minor, is imposed and proposed.

Further, we urge the committee to amend title VII to reduce the number of written comments needed to force a public hearing on a rule from 100 to 25, and we urge the committee to extend the period from 30 to 90 days for the publication and service of notice for a proposed new rule.

Impact analyses must distinguish between large companies and small companies. So much of the national anger concerning Federal



regulation stems from the fact that regulators generally do not distinguish between large corporations and small companies and family businesses. Many regulations are designed to provide for enforcement with large fines for noncompliance in the amount of thousands of dollars per day for such infractions as not filing paperwork on time. Huge corporations can absorb these large fines without much injury, but small companies and family businesses are forced into bankruptcy or severely crimped for the future.

There are many other kinds of regulatory harm done to small business because the regulators make no distinction about the relative size of the business. We ought to revisit government's entire set of regulatory enforcement procedures. All companies of goodwill provide jobs and want workers to be safe and healthy and want the air and land to be clean. Yet typical OSHA and EPA inspectors enter businesses in a surprise attack, point out violations, often very obscure violations of paperwork, and then leave only to assess heavy fines and penalties. The whole procedure is adversarial.

The fines and the penalties are highly arbitrary and their effect on small business sometimes draconian. The Federal Government's relationship with business does not have to be confrontational, arrogant, and punitive.

Why can the inspectors not use their talents to work with business, not against it? Why do our people have to be inspected and fined first? Why shouldn't being fined be a last resort rather than a first resort?

Let us improve an already good title VII with the addition of a public and private partnership between government and business. H.R. 7 should establish that partnership with commissions or working groups of both regulators and businesses that they regulate. This development would be absolutely great for the American people.

Thank you for the opportunity to testify.

Mr. GEKAS. We thank the gentleman and we will accept his written statement as part of the record without objection.

[The prepared statement of Mr. Hubner follows:]

PREPARED STATEMENT OF CORNELIUS E. HUBNER, CHAIRMAN AND CEO, AMERICAN FELT AND FILTER CO.

#### REGULATORY IMPACT ANALYSES WILL DETER NEW REGULATIONS

My name is Cornelius "Bud" Hubner and I am Chairman and Chief Executive Officer of the American Felt and Filter Company headquartered in Newburgh, New York. Thank you for the opportunity to testify on behalf of my business and the United States Business and Industrial Council before the Subcommittee on Commerce and Administrative Law of the House Judiciary Committee, on Title VII of H.R. 9, the Job Creation and Wage Enhancement Act of 1995.

The summary of my testimony is that requiring regulatory impact analyses will be an important deterrent to unnecessary new government regulations. We support Title VII of H. R. 9, but we believe that the definition of the threshold for these analyses is not set low enough in Title VII of H.R. 9. We believe that regulatory impact analyses should be required for all new regulations. Moreover, to encourage the roll-back of some of the existing over-regulatory burden, we strongly urge that regulatory impact analyses also be required on all existing regulations. We also urge that the government be required to prepare all regulatory impact analyses accurately.

## STOPPING OVERREGULATION

Title VII requires the government to prepare and issue regulatory impact analyses for all new major regulations. This is a beneficial and long overdue reform. We agree with the drafters of the Contract with America that every major new government regulation should be required to withstand a simple new test—does it provide the general public with benefits worth the costs to small business in order to comply with it? Moreover, we agree that government regulators must be forced to publicly report the costs of their new regulations.

Every year the federal government issues 66,000 pages of new rules and regulations. The Code of Federal Regulations now fills 21 feet of space on a library shelf.

The U.S. Small Business Administration estimates that small business owners spend at least one billion hours each year filling out government forms at an annual cost of over 100 billion dollars.

The Job Creation and Wage Enhancement Act of 1995 and its Title VII—the Administrative Procedure Reform Act of 1995—requires regulatory impact analyses and is an important step toward helping small business entrepreneurs in America to stop excessive government regulations. Title VII would require all federal agencies to prepare regulatory impact analyses which assess the costs and risks of each new major regulation. But as good as Title VII is, it does nothing to roll-back the many already excessive government regulations which already are in force. Requiring regulatory impact analyses for all existing regulations might occupy the bureaucracy, further hindering the promulgation of needless new regulations, and lead to the roll-back of some existing regulations.

We must emphasize that small business employs about *half the workforce* and creates about *two-thirds of all new jobs*. We applaud the desire of Congress to promote economic growth and stimulate job creation, and we agree that Congress needs to provide relief to the burdens of over regulation to those who create most new jobs—small business. Passage of a strong regulatory impact analysis requirement helps to discourage new regulations, and is a critical reform needed by the creators of most new jobs. But again, it does nothing to roll-back already excessive government regulation.

Government over regulation causes just as much pain to American small businessmen as high taxes. Indeed, over regulation is a form of taxation. The direct costs of regulatory compliance to businesses are estimated to range between a staggering 500 billion to 800 billion dollars.

## BACK TO BASICS

President Thomas Jefferson defined as good government that government which governed least, when he said in his first inaugural address:

A wise and frugal government which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government.

And as the 5th Amendment to the Constitution states: “. . . nor shall private property be taken for public use, without just compensation.”

Government bureaucrats who have ever increasingly intruded into our lives should be reminded of President Jefferson's wise advice and the protective language of the 5th Amendment. Today our federal government is neither frugal nor restrained. It refuses to let individuals regulate their own pursuits and industries, and by its insistence on its own over regulation, consistently takes far more than its fair share of bread from the mouth of labor. Increasingly, the government is confiscating private property without any compensation.

Over regulation stifles new job creation, significantly drives up the cost of consumer products, reduces productivity, and severely hampers the ability of American business to compete in the world marketplace. In short, over regulation lowers the standard of living for every American. Thus, the government should do all in its power to ensure that all regulations are written with the utmost care and only after the most thorough consideration.

## REQUIRING REGULATORY IMPACT ANALYSES

Title VII requires federal agencies to issue regulatory impact analysis statements for all major new regulations by completing a regulatory impact checklist when proposed new regulations would effect more than 100 people or cost a single individual over 1,000,000 dollars.

For far too long government agencies have been able control the lives of hard-working Americans in an authoritarian fashion. Government agencies should be forced to justify their proposed regulatory actions before they close down businesses and destroy jobs.

Regulatory impact analysis statements are important because they provide a yardstick to determine how much new regulations will cost the government to enforce, how much compliance will cost private citizens and businesses, and what possible unintended side effects might be felt in the economy.

Unfortunately, the Clinton Administration is allowing government agencies to escape having to issue regulatory impact statements for most new regulations they issue.

Requiring government agencies to do impact analysis statements is rational and beneficial to small business. No matter how well intentioned regulators may be, they are not working in the private sector and do not have to deal with the unique problems of running a business on a daily basis. Most government regulators have no conception of the cash flows required even to meet a weekly payroll. Requiring the writing of regulatory impact statements will force regulators to foresee consequences of possible actions they may not have otherwise considered, and this will inevitably force them to write fewer and better regulations. Performing regulatory impact analyses is an important function—especially since, after a rigorous analysis, bureaucrats will usually find it is more beneficial not to issue any new regulations at all.

There is no excuse for not scientifically and analytically testing whether or not proposed regulations will hurt people. Businesses and their employees deserve a thorough explanation of what governmental agencies perceive to be problems and how they intend to solve them. The necessity and reasonableness of new regulations should also be clearly explained. But that is only the start of constructing a better regulatory process.

Regulators ought to be forced to do a cost versus benefit analysis of their proposed new regulations because people need to know the various ramifications when new regulations are proposed. How many people will be effected? What are the costs of compliance? Will inspections be required? How much paperwork and record keeping will be created? Is a license or permit to be required? Will new employees have to be hired just to comply with the new rules?

Also, people deserve to know a number of other things critical to the regulatory decisionmaking process, such as the scientific and technical basis underlying the agency studies, what assumptions were made, and the quantification of the risks to be addressed.

Government agencies should be forced to prove beyond a reasonable doubt that the proposed new regulations are the least costly and most practical solution, and if other alternatives were considered, why they were removed from consideration.

Fortunately, these concerns have been included in the regulatory impact analysis checklist requirements in H.R. 9. The requiring of a regulatory impact statement will help make our government more accountable to the people.

The most important of these checklist items in Title VII is the cost versus benefit analysis.

But just having to do a cost versus benefit analysis is not enough. Committee members need to be sure that government agencies are forced to produce accurate cost versus benefit analyses. Government agencies ought to be forced to carry the burden of proof of accurately estimating the costs they are passing on to consumers taxpayers.

Forcing government agencies to complete the regulatory impact checklist will do no good unless they issue accurate statements. The checklist items mentioned above are basic common sense questions and inquiries that citizens ought to be able to expect the government to answer before any new regulations affecting their lives are issued. Also, the checklist could serve as a basis for more reform, protecting the businesses and individuals harassed by regulators and leading to the roll-back of many existing regulations.

But unfortunately, no provision exists in this legislation to hold agency regulatory writers accountable for the poor decisions they have already made in already existing regulations.

When an agency like the Occupational Safety and Health Administration (OSHA) underestimates the cost of a regulation, the regulation is still usually upheld by courts.



## LOWERING THE THRESHOLD FOR REGULATORY IMPACT ANALYSES

We would like to address some specific criticisms of the definition Section 7004(b), as written in Title VII. If a proposed rule affects more than 100 people or would cost a person more than 1,000,000 dollars, then a regulatory impact statement, with some exceptions, will be required.

In fact, even more stringent requirements could be written into the legislation requiring regulatory impact analysis statements. The Committee could reduce the threshold of affected persons from 100 to 50 or 25 and reduce the threshold of expenditure from 1,000,000 dollars to 100,000 dollars. Ideally, a regulatory impact analysis should be done every time any new regulation, however minor, is proposed.

Further, we urge the Committee to amend Title VII to reduce the number of written comments needed to force a public hearing on a rule from 100 to 25, and we urge the Committee to extend the period from 30 to 90 days for the publication and service of notice for a proposed new rule.

Clearly, however, Title VII's definition of "major rule" has fewer loopholes than President Clinton's current definition, and is thus far more preferable.

Under current law far too many loopholes exist that allow government agencies to avoid preparing regulatory impact analyses and issuing regulatory impact statements. For instance, regulatory impact analysis statements are not required to be issued for health-related regulations, and due to various court decisions, OSHA even announced that it would not employ cost-benefit analysis because it was arbitrarily deemed unnecessary to assure rational rulemaking judgements.

Title VII is a step in the right direction toward ensuring that common sense government regulations will be written, but the legislation still does not solve all problems of over regulation facing small businesses.

## REQUIRING ACCURACY IN REGULATION

Unfortunately, while requiring regulatory impact analyses, such analyses are not always accurate. But all regulatory impact analyses should be required to conform to some standard of accuracy. In fact, according to court cases, OSHA believes that it is not legally required to accurately estimate the cost of compliance with any existing standard. This OSHA claim is outrageous—how can any government agency assert that while it has the right to issue new regulations, it does not have to engage in accurate analysis of these regulations? Thus the law should specify that the bureaucrats should strive to make all regulatory impact analyses be as accurate as possible and include penalties if they do not.

Regulators need to be held more accountable for their mistakes. In one important case, regarding product safety management standards, OSHA estimated that the total costs for compliance and implementation of these standards over a ten year period was 6.673 billion dollars. William Bridges of JFB Associates in the January 1994 issue of *Process Safety Progress*, however, estimates that OSHA underestimated the cost of these new regulations by a factor of 15. Unfortunately this is not uncommon. OSHA typically under-estimates the costs of compliance with their regulations.

In spite of the spiraling costs of the new regulations, they are being implemented without mercy by OSHA, and companies have little chance of winning in expensive legal battles.

## CONCLUSION

We strongly support the speedy passage of the Job Creation and Wage Enhancement Act of 1995, and its Title VII, on Regulatory Impact Analyses. We further urge the Committee to stand firm and not dilute the regulatory impact checklist and to lower the threshold requirements for issuing regulatory impact statements.

Mr. GEKAS. And now we will turn to Mr. Maher. Maher, is that correct?

Mr. MAHER. Maher, that is correct.

## STATEMENT OF M. BRIAN MAHER, PRESIDENT, MAHER TERMINALS, INC.

Mr. MAHER. Mr. Chairman and members of the committee, I thank you for the opportunity to testify today on the issue of regulatory reform, particularly as it relates to dredging.

My name is Brian Maher, I am president of Maher Terminals, one of the largest privately owned businesses operating in the Port of New York and New Jersey. My company provides the services and personnel for ships to load and unload the products they carry. We presently employ some 1,700 management and unionized employees and have invested millions of dollars in our facilities since we started operations 48 years ago.

As a practical businessman and a major stakeholder at the port, I would like to offer my perspective of how government regulation in the area of dredging has impeded my ability and that of my colleagues to run efficient, cost-effective operations.

The channels and berths at the New York/New Jersey port that allow my company to service a good portion of the nearly 5,000 ships that call there annually are silting up. The various Government agencies charged with overseeing and implementing legislation and regulations pertaining to dredging have been unable to solve this problem despite years of testing, talking, and testimony. In the private sector where decisions are made much more expeditiously, this has been quite frustrating because it is eating into our operations and yet it is beyond our control.

Although we have invested millions of dollars in capital, equipment, and technology, we are, quite literally, not the masters of our ships. For example, maintenance dredging of berths at the Port New York/Elizabeth Marine Complex is a regularly needed task that traditionally took 6 months to complete at a cost of about \$1 million. However, getting the last permit took 3 years and the total project cost was \$17 million before it was completed in mid-1993. Meanwhile, nearly two dozen other dredging projects are also caught in a regulatory maze several years long.

The ripple effects of this situation threaten not only to choke off business at my terminals but other businesses throughout the port. It has become somewhat of a bitter joke in the industry that petroleum and container vessels have had to lighten their loads, which in itself is costing tens of millions of additional dollars, prior to entering the port in order to avoid scraping their bottoms. Or they have had to leave containers behind in order to float high enough to leave the port. And some of these huge container ships which cost \$50,000 a day to operate have often had to wait up to 12 hours for high tide to allow them to move in and out of the harbor. Increasingly, shipowners are solving the problem by redirecting their vessels and cargo to the Port of Halifax in Canada.

But all of this has mattered little, if at all, to the Federal agencies that oversee dredging activities. They have allowed a dangerously narrow and shortsighted environmental policy to dominate their thinking rather than the broad issues that threaten our Nation's security, business interests, and trade status. They have debated at length among themselves regarding standards, requirements, procedures and protocols for dredging permits and disposal of dredge material, and they have changed and rechanged and changed again those standards, requirements, procedures, and protocols.

They have argued whether the acceptable level of dioxin traces in dredge material under consideration for ocean disposal should be 25 parts dioxin for every 1 trillion parts of mud or 10 parts of

dioxin for every 1 trillion parts of mud. They have devoted much time, effort, and concern to investigating topics like why the one-tenth of an inch long amphipod creatures they insist on using for testing keep dying before the tests can be conducted. They have pondered over whether a dredging permit that was delayed 3 years by their inaction should be amended to allow dredging of the additional silt that accumulated during the 3-year delay and on and on and on.

About the only thing the Federal agencies have agreed upon is that the New York/New Jersey region should be subject to different and stricter dredging permit standards than other regions. Moreover, the antidredging groups openly admit New York/New Jersey is their test case for the rest of the country. The handwriting is on the wall: The obstacles we faced at our port will become standard for every other U.S. port with dredging requirements.

Despite litigation, conferences, outreach sessions, and meetings, the various Federal agencies have been unable to coordinate their respective roles and actions so as to streamline the regulatory process and to issue permits within reasonable and realistic time frames. The scope of the problem is so pervasive and the practices of these Federal agencies so bureaucratic that it becomes clear that the answer is a new national policy, including reform of the regulatory process that will put everything in balance to accommodate the needs and objectives of business, economic, and national defense concerns, as well as legislative compliance and environmental safeguards.

I am simply asking for a sensible, responsive, coordinated, and efficiently streamlined procedure for processing dredging applications. And I am asking that it be done in an economically viable manner. A legislative mandate is needed to require the Federal agencies concerned with the dredging process to coordinate their activities so as to assure that the channels and not just the Port of New York and New Jersey but in all our country's harbors are dredged to the depths that vessels require.

It is also important that dredging and disposal do not stop while such solutions are sought. The environmental factors can be satisfied within reason without choking off the highways of waterborne commerce that feeds and fuels our Nation's ports and inland industries and populations.

We in the ports are not the only ones to recognize the problem. Secretary of Transportation Federico Pena, whose Department has no direct responsibilities over dredging but which has a lot at stake in it, correctly described dredging as an important transportation issue.

In an attempt to remedy one of the problems we are experiencing, he created the Interagency Working Group on the Dredging Process. The Secretary said we must solve the current dredging crisis which is in reality an economic crisis. Dredging is submerged in conflicting missions and mandates among a number of Federal agencies and a myriad of Federal rulings and regulations plus State and local government laws which make it a miracle every time a port dredging project is brought to fruition.

Despite the leadership shown by the Secretary and the well-intentioned work of the task force, congressional action is needed.



Mr. Chairman, I implore you and the members of the committee to give this story strong and meaningful attention as you consider how to reform the regulatory process. We need regulatory agencies that consider and balance the cost impact of their regulations along with the regulatory purpose of their actions.

Mr. Chairman, thank you for this opportunity to address the committee on a matter of the greatest importance to the Port of New York and New Jersey and I believe to all ports and to all Americans. Thank you.

Mr. GEKAS. Thank you and we will accept your written statement for the record.

[The prepared statement of Mr. Maher follows:]

PREPARED STATEMENT OF M. BRIAN MAHER, PRESIDENT, MAHER TERMINALS, INC.

Mr. Chairman and Members of the Committee:

I thank you for the opportunity to testify today on the issue of Regulatory Reform, particularly as it relates to dredging.

My name is M. Brian Maher. I am President of Maher Terminals, Inc., one of the largest privately-owned businesses operating in the Port of New York and New Jersey. My company provides the services and personnel for ships—which move 95 percent of the world's trade—to load and unload the products they carry...and that means everything from clothes...to cars...to oil...to...plastics, steel, and chemicals...to military supplies. We service over 20 different steamship lines—operating between our Port and Europe, Asia, South America, Africa and Australia/New Zealand—through our facilities in Newark and Elizabeth, New Jersey. We presently employ some 1700 management and unionized employees and have invested millions of dollars in our facilities since we started operations 48 years ago.

The Port as a whole generates \$20 billion a year in economic activity, including nearly \$400 million in state and local taxes; it is responsible directly and indirectly for over 180,000 jobs; it is a pipeline for exports of every kind; and, perhaps most importantly, it is home to a major military supply depot, and a key naval ordnance facility, and has played a central role in time of International crises...when military operations and foreign aid and assistance required rapid, broad-based and efficient movement of troops and equipment . . . as well as food and material . . . to locations abroad.

As a practical businessman and a major stakeholder at the Port, I would like to offer my perspective of how government regulation in the area of dredging—or lack of it, which is probably a better description—has impeded my ability and that of business colleagues to run efficient, cost-effective operations.

To put it quite simply, the Port is mired in an increasingly hopeless tangle of government red tape, environmental radicalism and political naivete...and it is hurting business. The irony is that with the passing of such legislation as NAFTA, GATT and ISTEAA—and the promise of expanded international trade—we in the business community were initially ecstatic that business and government were finally in agreement on how to increase economic prosperity in this country. But we learned quickly that to be in philosophical agreement does not necessarily solve the practical problems of doing business at the Port, which is an integral component in any expanded trade efforts.

The channels and berths at the New York/New Jersey Port that allow my company to service a good portion of the nearly 5,000 ships that call there annually—which move over 13 million tons of general cargo and 25 million tons of bulk cargo—are silting up.

This is a serious problem...because if the United States is to maintain world-class competitive status in the international trade area and ensure its might as a military power, both consumer-related trade and military cargoes must be allowed to move without impediment. This, of course, means that our harbor's navigation channels must be deep enough to accommodate those vessels that come in and out on a daily basis. But like many other commercial maritime centers, the Port of New York and New Jersey is a river port and the natural depth of its harbors is only about 18 feet, less than half of what's needed to accommodate modern ships safely and efficiently. In order for the Port to function, therefore, it must be dredged to at least 45 feet and then there must be continuous maintenance dredging to keep the harbor clear of the silt and must that is continuously deposited by the rivers. This has been the case for over two centuries, but in the last several years we have been finding

it difficult to impossible to obtain government permission to perform the necessary dredging operations to clear the silt out of the channels and berths. Today, we are at the cross-roads of major crisis that has developed at an exponential rate due to bureaucratic lethargy and inability to focus upon and sort out what are claimed to be—but which, in the final analysis, really are not—competing or irreconcilable needs and interests.

I am talking about issues surrounding the dredging permit process and the disposal of dredged materials.

The various government agencies charged with overseeing and implementing legislation and regulations pertaining to dredging have been unable to “get it together” despite years of testing, talking and testimony. In the private sector—where decisions are made much more expeditiously—this has been quite frustrating because it is eating into our operations . . . and yet it is beyond our control. Although we have invested billions of dollars in capital, equipment and technology, we are—quite literally—not the masters of our ships.

For example, maintenance dredging of berths at the Port Newark/Elizabeth Marine Complex is a regularly needed task that traditionally took six months to complete at a cost of about \$1 million. Because of the dredging crisis, getting the last permit took three years at a cost of \$17 million before it was completed in mid-1993. And now, because of siltation, it needs to be dredged again. I have attached a chronology that describes the three-year process. Meanwhile, nearly two dozen other dredging projects are caught in a regulatory maze several years long. They include privately-owned cargo and oil terminals, military facilities and public berths as well. New York City needs regular dredging for the public utilities generators that power it, and the barges that move its garbage to island landfill sites. Even the Statue of Liberty needs dredging to accommodate the tourist boats.

The rippling effects of this situation threaten not only to choke off business at my terminals, but throughout the port, including other port-related businesses such as insurance, banking, freight-forwarding, dictated by simple physics. If the Port of New York & New Jersey—and other ports like it—if not dredged, it will become too shallow to accommodate ships safely and efficiently; if it cannot accommodate lines; if steamship lines abandon the Port, it will not generate regional economic activity . . . or taxes . . . or jobs . . . and will be unable to serve as a conduit for exports and imports; if it is unable to serve as a conduit for exports and imports, more trucks will clog the highways getting cargo in and out of the region and—on a large scale—the nation's competitive standing in the world marketplace will be jeopardized. It is all quite simple, but sad . . . and I will tell you why:

It has become somewhat of a bitter joke in the industry that petroleum and container vessels have had to lighten their loads—which in itself is costing tens of millions of additional dollars—prior to entering the Port of New York and New Jersey in order to avoid scraping their bottoms...or they have had to leave containers behind in order to float high enough to leave the port. And some of these huge container-ships—which cost \$50,000 a day to operate—have often had to wait up to 12 hours for high tide to allow them to move in or out of the harbor. Increasingly, ship owners are solving the problem by redirecting their vessels and cargo to the Port of Halifax in Canada, which can handle the fully-laden vessels and is a competitor due to the nature of international shipping. This diversion of cargo not only means loss of business for the region, but undermines the trade competitiveness of the nation as a whole.

But all of this has mattered little, if at all, to the federal agencies that oversee dredging activities. They have allowed a dangerously narrow and short-sighted environmental policy to dominate their thinking and have chosen to focus on outlandish minutiae, rather than the broad issues that threaten our nation's security, business interests, and trade status: they have debated at length among themselves regarding standards, requirements, procedures and protocols for dredging permits and disposal of dredged material; and they have changed and re-changed and changed again those standards, requirements, procedures and protocols, which takes time and increases costs dramatically. And even after all of this pontification, the evaluative criteria chosen is in most cases not field-tested and verified...so there is little understanding of the real risks involved. And what is most frustrating is that there is no single point of control here in Washington.

In the meantime, cargo that once came to our Port is now going to Halifax.

But yet they persist in their myopic pursuits: they have argued whether the acceptable level of dioxin traces in dredged material under consideration for ocean disposal should be 25 parts dioxin for every 1 trillion parts of mud, or 10 parts of dioxin for every 1 trillion parts of mud; they have devoted much time, effort and concern to investigating topics like why the one-tenth-of-an-inch-long amphipod creatures they insist on using for testing keep dying before the tests can be con-

ducted; they have pondered over whether a dredging permit that was delayed three years by their inaction should be amended to allow dredging of the additional silt that accumulated during the three-year delay . . . and on . . . and on . . . and on.

About the only thing the federal agencies have agreed upon is that the New York/New Jersey region should be subjected to different—and stricter—dredging-permit standards than other regions. Moreover, the anti-dredging groups openly admit that New York/New Jersey is their test case for the rest of the country. The handwriting is on the wall: the obstacles we've faced at our port will become standard for every other U.S. port with dredging requirements.

Despite litigation, conferences, colloquiums, surveys, outreach sessions and meetings, it remains a fact of life that the various federal agencies have been unable to coordinate their respective roles and actions so as to streamline the regulatory processes and to issue permits within reasonable and realistic timeframes. The scope of the problem is so pervasive . . . and the practices of these federal agencies so bureaucratic . . . that it becomes clear that the answer is a new national policy that will put everything in balance to accommodate the needs and objectives of business, economic and national defense concerns . . . as well as legislative compliance and environmental safeguards.

As a member of the private sector—which has been virtually hog tied by these bureaucratic inefficiencies—I am simply asking for a sensible, responsive, coordinated and efficiently streamlined procedure for processing dredging applications. I feel it is only fair that a permit applicant should be able to have the rules, requirements and standards explained; provide information based on those requirements for federal agency decisionmaking; expect prompt attention within a reasonable time period; and receive a judgment based on scientific and operational factors within a specific and reasonable timeframe. And this should all be done in an economically-viable manner.

My experience confirms that this requires a legislative mandate to require the primary government agencies concerned with the dredging process, including the EPA, DOT, the Corps of Engineers, NOAA and the Fish and Wildlife Service, just to name a few...to coordinate their activities so as to assure that channels in not just the Port of New York and New Jersey, but in all of our country's harbors, are dredged to the depths that these vessels require in order to operate at optimum capacities.

It is also important that you realize that dredging and disposal cannot stop while such solutions are sought. Even if the solutions take years to implement, we cannot just close down in the meantime. The business community cannot face more instances of shipping lines diverting their cargo and/or applicants withdrawing their permit applications because of the impossibility of their meeting the criteria set by government to an extent beyond their financial or other means. The environmental factors can be satisfied within reason without choking off the highways of water borne commerce that feed and fuel our nation's ports and inland industries and populations. They are a prime key to our national competitiveness in an era of keen rivalry for international markets.

Mr. Chairman, I implore you and the members of this Committee to give this matter the strong, meaningful and expeditious attention and action that have become absolutely necessary, inasmuch as the normal executive and administrative avenues of approach have proven inadequate and unstable, and the bureaucracy plain and simply is unable to recognize and react to the consequences of not permitting technology. If this situation is allowed to continue, it will only get worse as the silt accumulates and generates even greater and more costly predicaments that in time will be beyond reversal and correction. What we need is a clear, lucid reasonable and effective national policy on dredging that has the backing of the Congress...and to which it gives unmistakable direction and expediency. Attached also is a recent article by James Capo, President of the New York Shipping Association.

Mr. Chairman, thank you for this opportunity to address the Committee on a matter of the greatest importance to our port and, I believe, to all Americans.



# Fighting

# City Hall on Dredging

By JAMES A. CAPO

Two hundred and nineteen years after its founding, the United States still has not come to grips with three simple physical facts of life:

- It is largely an island nation.
- Island nations need ports if they want to trade with the rest of the world.
- Most ports need dredging and regular dredging to handle the ships that carry that trade.

The failure to understand these points, unfortunately, is the clearest message to emerge from the Clinton administration's long-awaited report on dredging.

It's a chilling message with grim implications for the future of the nation, its businesses and workers in an era of integrated world markets. Issued on the last workday of 1994, six months behind schedule, the Action Plan of the Interagency Working Group on the Dredging Process in the United States offers little in the way of action or planning. Its 20 pages comprise a tepid if well-meaning collection of broad generalities, bureaucratic trivia and straight-faced calls for more committees and more studies.

This is not to say the report ignores the need for dredging or is erroneous or off base. Its observations generally are not inaccurate, and two or three of its 18 recommendations — on funding and on tending to sewer, storm-drain and non-point-source pollution — have real merit.

It might even have served as a useful introductory blueprint, had it been issued a decade or two ago.

But the report, with its faint admonition that perhaps there could be a crisis one of these days, overlooks a fundamental fact: There already is a crisis. Rome is burning, and can it afford the time to ponder preliminary studies on the subject of "Fire, Flood or Foe?"

The Port of New York & New Jersey, the nation's leading seaport for 175 years and still one of its top three, is mired in an increasingly hopeless tangle of government red tape, environmental radicalism and political unawareness.

The channels and berths that allow New York/New Jersey to handle 4,000 ships that annually move 13 million tons of general cargo and 25 million tons of bulk cargo — everything from coffee to sneakers to cars to oil, plastics, steel and chemicals — are silted up. Without dredging, they inevitably will return to their natural average depth of 18 feet, less than half what is needed to handle ships safely and efficiently.

But the port finds it difficult to impossible to win government permission to clear the silt out of the channels and berths, as it's done continually for a century or more.

The reopening of a major container terminal — the New York side of the harbor's last best hope to expand its share of ship handling in a significant way — is threatened because there's no place to put 150,000 cubic yards of material that first must be dredged from it.

The maintenance dredging of berths at our major center, the Port Newark/Elizabeth Marine Complex, is a regularly needed task that tradi-

tionally took six months and cost about \$1 million.

Because of the dredging crisis, the job took three years and cost \$17 million before it was last completed in mid-1993. And now, because of situation, the job needs to be undertaken again.

Meanwhile, nearly two dozen other dredging projects are caught in a regulatory pipeline several years long — some stalled, some inching along — they include oil terminals, military facilities and public marinas. New York City needs regular dredging for the public-regulいた dredging that power it, and the barges that move its garbage to its island landfill site.

Even the Statue of Liberty needs dredging to accommodate tourist boats.

It's all been on virtual hold. Government agencies — prodded by myopic environmental radicals, crisis-du-jour media and politically correct politicians — dithered, stalled, changed standards and requirements, and rechanged standards and requirements. The end still isn't in sight.

Moreover, the anti-dredging groups admit that New York/New Jersey is the test case for their brave new port world. The hoops we've been put through will be the standards that every other port must meet tomorrow. Not a few years down the road, or next decade. Tomorrow.

And the Clinton administration thinks there could be a crisis in the future?

The sad truth is that neither the

public nor its representatives generally realize that — as the interagency report acknowledges — 95% of America's trade moves by ship. Nor do they recognize that ships need ports.

Almost everyone, however — including those of us in ports, shipping and trade — supports the environment. Unfortunately, when a headline-oriented crisis mentality shoulders science out of the way in the setting of political agendas, port and economic interests lose. Even when the risk of environmental disasters like oil spills is increased. Even when supposedly pro-ocean actions will result in environmental damage elsewhere, like air pollution.

What ports don't need now is another obscure, well-intentioned report that attracts little attention and soon sinks from sight. What they need is loud, clear, unequivocal public endorsement from the very top levels of the federal government — and continuing commitment from the same quarter.

Otherwise the nation's hopeful dreams of economic prosperity through trade will be buried in the thick layers of silt clogging its ports.

*James Capó is president of the New York Shipping Association, which represents New York/New Jersey port employers, and co-chairman of the Maritime Resources Council, a public-education group.*

## Chronology of PN/E Dredging Permit

- o Meeting w/Corps on PN/E February 15, 1990
- o Sampling Plan Meeting w/Corps March 9, 1990
- o Sampling Plan obtained from Corps April 5, 1990
- o PA submits Formal Application to Corps April 11, 1990
- o Original Corps Permit expires May 6, 1990
  
- o Meet w/NJDEPE to confirm Testing Protocol June 25, 1990
- o Letter, Corps to ENSECO Lab, requesting June 19, 1990  
QA data prior to initiation of 28 day test
  
- o First Bulk Sediment Test Results available June 26, 1990  
for Corps (Reaches B & D)
- o PA submits Bulk Sediment Data to NJDEPE July 11, 1990
- o PA inspects Labs (S. Solomon) July 12, 1990
  
- o Bulk Sediment Analyses formally submitted to July 3, 1990  
Corps; PA requests go-ahead to start 28 day  
test
  
- o PA submits additional information (boring logs) July 23, 1990  
which Corps requested as a result of the 7/3/90  
submission
  
- o PA compiles data summary sheets of data supplied on August 17, 1990  
7/23/90, which Corps had requested
  
- o Corps provides PA with approved sampling schemes September 6, 1990  
& concurrence to start-up 28 day testing
  
- o PA requests EPA's concurrence w/Corps' September 7, 1990  
28 day sampling plan; PA meets with EPA, gets  
verbal ok
  
- o EPA forwards written concurrence September 11, 1990
  
- o Port/Eng. Dept. give Materials Div. formal September 20, 1990  
authorization to proceed w/28 day testing
  
- o PA submits concurrence (EPA/Corps) to NJDEPE September 20, 1990
  
- o PA staff meet at ENSECO facility to discuss October 1, 1990  
discrepancies in the report
  
- o PA notifies ENSECO to repeat 28 day test November 21, 1990
  
- o PA submits Bioassay data (except for 28 day January 4, 1991  
tests) to the Corps
  
- o Corps sends comments to PA regarding 1/4/91 February 15, 1991  
submittal

- Results of 28 day re-test (see 11/21/90) verbally reported to PA by ENSECO March 14, 1991
- PA submits response to Corps comments of 2/15/90 and submits 28 day data March 19, 1991
- PA submits formal application, with all test results, to NJDEPE March 27, 1991
- NJDEPE Permit expires April 4, 1991
- Corps requests additional information (to PA 3/19/91 submittal) on the data April 29, 1991
- PA responds to Corps' 4/29/91 comments May 9, 1991
- Corps requests additional "clarification" of the data May 22, 1991
- Corps requests additional "clarification" of the data May 30, 1991
- PA responds to Corps' 5/22 and 5/30 comments June 13, 1991
- PA submits draft Risk Assessment (EA) report to Corps June 19, 1991
- NJDEPE issues permit with no barge overflow July 1, 1991
- PA responds to NJDEPE barge overflow restriction July 25, 1991
- Corps' WES provides comments on EA Report August 6, 1991
- Interagency DIOXIN Steering Committee meets September 31, 1991
- Corps provides new sampling plan for re-testing of Reach A November 15, 1991
- Corps issues 30 day public notice for Reaches B, C & D, states that Interim Guidelines for Dioxin have been established (25 pp. w/capping) November 25, 1991
- Corps issues public notice announcing a public hearing (to be closed 3/6/92) January 24, 1992
- Corps issues public notice which extends comment period to 3/16/92 February 21, 1992
- Public Hearing held February 24, 1992
- End of comment period March 16, 1992



- Corps/EPA agree on interim guidelines for dioxin disposal March 11, 1992
- PA responds to EDF June 1992 Critique of PA Report and EDF 3/16/92 comments on Public Notice June 24, 1992
- PA responds to Public Notice/Hearing comments June 18-26, 1992
- Letter, EPA to PA stating further criticism of Risk Assessment July 13, 1992
- Later, EDF to Corps/EPA questioning interim criteria, need for EIS (dioxin), baseline data at Mud Dump, more public noticing July 29, 1992
- Letter, EDF to PA still questioning interim criteria and Risk Assessment August 10, 1992
- Memo PA, indicating Corps wants a dioxin pre-tested material or sand cap September 11, 1992
- Letter, EPA to PA requesting further coordination on Risk Assessment Information September 25, 1992
- Letter, PA to Corps formally requesting modification of PN/PE application to use Ambrose as second source cap October 6, 1992
- Letter, NJDEPE to PA modifying NJDEPE Permit to include overflow monitoring October 8, 1992
- Letter, PA to NJDEPE, accepting the 10/8/92 NJDEPE permit modification October 9, 1992
- PA submits Reach A re-test data to Corps October 14, 1992
- Corps issues Supplemental Public Notice for Ambrose cap October 19, 1992
- EDF letter to Corps/EPA/NJDEPE/DEC/PA requesting EIS related to dioxin, PHC's and cumulative effect of sand mining November 4, 1992
- F&WS letter, to Corps requesting extension of comment period on cap to 12/9/92 November 18, 1992
- Memo, PA announcing meeting to be held between PA/Corps/EPA/NJDEPE/EDF November 20, 1992
- Letter, Corps to PA transmitting comment letters from cap supplemental Public Notice November 24, 1992

- PA submits formal application for Reach A November 19, 1992
- Letter, EPA to Corps approving Management & Monitoring Plan at Mud Dump December 4, 1992
- Letter, USF&WS to Corps stating objections to permit and referring to elevation procedures in event of Corps' issuance of the permit December 9, 1992
- PA responds to cap Public Notice comments (other than 12/9/92 USF&WS letter) December 9, 1992
- Letter, EPA to Corps renegging on the 25 pptr. criteria December 31, 1992
- Letter, EDF to Corps/EPA mimicing EPA letter of 12/31/92 January 4, 1993
- Corps issues permit for 500,000 cubic yards January 6, 1993
- Letter, EDP to Corps/EPA/DEP raising volume/testing issue January 11, 1993
- Letter, EPA to Corps mimicing EDF letter of 1/11/93 and renegging on ocean disposal January 13, 1993
- Letter, PA to EPA defending volume/testing issue January 13, 1993
- Letter, Corps to PA suspending permit January 14, 1993

## CHRONOLOGY OF PN/ELIZABETH DREDGING PERMIT CONTINUED

- Letter, EDF to Corps objecting to volume of material and seeking re-testing of dredged material January 13, 1993
- Letter, PA to Corps requesting meeting on January 19, 1993 to discuss permit issues January 15, 1993
- Letter, Corps to PA notifying Pa that Corps and EPA are available to meet on January 27, 1993 January 15, 1993
- Letter, PA to EPA affirming volumes to be dredged January 26, 1993
- PA meets with Corps/EPA January 27, 1993
- EPA 2-day Conference on Dredging and Disposal of NY/NJ Harbor Sediments January 27, 28, 1993
- Letter, EDF to EPA raises bio-accumulation issue throughout harbor and criticizes criteria level of 10 ppt January 29, 1993
- Letter, NMFS to EPA raises Endangered Species Act issue February 2, 1993
- Corps and Port Authority meeting to clarify outstanding issues raised during suspension and January 27, 1993 meeting February 4, 1993
- Congressional Forum on dredging February 5, 1993
- Letter, PA to Coast Guard requesting review of safe berth depth for facility February 9, 1993
- Letter, EPA to Corps specifies conditions that have to be met for re-issuance of permit for Reaches B and C, while Reach D is acceptable without further testing February 12, 1993
- Letter, EDF to Corps requesting a meeting and opposing EPA's decision not requiring additional testing for Reach D February 17, 1993



## CHRONOLOGY OF PN/ELIZABETH DREDGING PERMIT CONTINUED

- Letter, Corps of PA requiring all Reaches to be tested for dioxin using same methods as in 1990 February 18, 1993
- Letter, PA to EPA seeking clarification and sign-off on sampling and testing protocols February 24, 1993
- Letter, Corps to NMFS answering Endangered Species Act issue March 5, 1993
- Letter, PA to Corps (copy EPA) transmitting dioxin re-test results March 12, 1993
- Letter, PA to Corps (copy EPA) transmitting TOC test results March 17, 1993
- Letter, PA to Corps (copy EPA) clarifying weight basis used for dioxin sediment characterization March 19, 1993
- Letter, NMFS to Corps responding to Corps March 5, 1993 letter on the ESA issues March 23, 1993

- Letter, EPA to Corps, approving material for ocean disposal based on the dioxin re-test results. However, EPA likewise directed the Corps to resolve concerns of the National Marine Fisheries Service regarding endangered species at the Mud Dump site March 29, 1993
- NMFS issues biological opinion on Endangered Species Act resulting in special conditions to be incorporated into the upcoming reissued permit. May 6, 1993
- Reinstatement of permit by the Corps. May 26, 1993
- Suit filed by Clean Ocean Action against the Corps. June 1, 1993
- Commencement of Dredging June 2, 1993
- Issuance of order by Judge Debovoise regarding further testing, regulations and Green Book procedures July 6, 1993
- Completion of dredging July 7, 1993
- Commencement of capping. July 12, 1993
- Commencement of surveys. September 12, 1993
- Commencement of final capping. September 17, 1993
- Completion of capping. October 13, 1993
- Commencement of surveys by Corps. October 16, 1993
- Filing of briefs with Court. October 29, 1993

## FACT SHEET: PN/PE Marine Terminal, Reach "A" 02/03/95

Project Description:

Maintenance dredging of approximately 30,000 cubic yards from selected berths (#'s 10,12,21) within Reach A that are absolutely necessary to a minimum depth of 35 feet MLW with 2 feet overdepth. Permit application would be modified to reflect interpier disposal at Berths 18, 20 & 22 instead of the previously proposed alternative of ocean disposal.

Status:

- 09/10/93 -- PA Environmental Engineering memo estimated upland disposal of dredged material from Reach A would cost between 2.7 and 5.4 million dollars.
- 10/04/93 -- Letter to Corps requesting concurrence with interim plan (interpier disposal at selected berths) for dredged material within Reach A. NJDEP was sent similar letter. Through verbal communication, Corps indicated that they would not respond to this request.
- 10/15/93 -- NJDEP contacted (B. Piel) regarding interim proposal. No response from NJDEP to date.
- 11/04/93 -- PGAD memo to Port Department requesting more detailed information regarding disposal and containment of dredged material.
- 08/17/94 -- Port Department and PGAD meet to discuss dredging with interpier disposal.
- 09/27/94 -- PGAD memo to Port Department expressing concern over the lack of proposing containment methods in conjunction with interpier disposal permit modification.
- 11/15/94 -- Port Department and PGAD meet. Agreement on the inclusion of containment in permit modification request has not been reached.
- 12/28/94 -- Port Department and OEPD meet. PGAD to prepare permit modification requests to Corps and NJDEP. No containment will be proposed up front by the Port Authority.

Actions:

Port Department to provide PGAD with new condition survey, drawings and volume computations. PGAD will prepare requests to modify Corp's permit application No. 92-15710-OD from ocean disposal to interpier disposal and NJDEP's existing Waterfront Development Permit and Water Quality Certification.



Mr. GEKAS. Mr. Chairman.

**STATEMENT OF AL WENGER, WENGER FEEDS, AND CHAIRMAN OF THE BOARD, EGG ASSOCIATION OF AMERICA**

Mr. WENGER. Thank you. The Egg Association of America represents more than 75 percent of the egg production in the Northeastern United States, and we do appreciate the opportunity to comment on H.R. 9's title VII dealing with regulatory impact analyses. This is a matter of very great importance to our industry and we have had some recent experience that may be helpful in your consideration of this legislation.

In 1990, the USDA issued an emergency regulation commonly referred to as the "See traceback regulation" to control the growing incidence of human outbreaks caused by the bacteria salmonella enteritidis (SE) in fresh shell eggs. This regulation was written by the USDA after consulting with industry and other Federal agencies. We agreed with the procedures called for in the regulation and, although we disagreed with the determination that it was not a major rule, we saw the need to move ahead with control measures as quickly as possible.

After a year of operating under the regulation, it was clear that the regulation was not getting the desired results; namely, reducing the number of outbreaks of human illness attributed to this bacteria. Moreover, we were learning that this problem was quite a bit larger and more complex than originally thought. For example, more than 3 billion eggs have been diverted from their normal markets, several millions of chickens have been disposed of, and at least one company has gone out of business. Yet we had not learned anything about controlling salmonella enteritidis and we could see no end to the problem.

In 1992, after a yearlong discussion among industry, government and several universities, we developed a voluntary, cooperative field research program called the Salmonella Enteritidis Pilot Project. It was from this effort a huge store of new scientific information emerged that has proven much of the original thinking antiquated and in some areas simply wrong.

The voluntary approach has worked. In 1964, the SE outbreaks were little more than half of those experienced in previous years. Other voluntary programs following the protocol of the SE pilot project have been started in New England, New York, and California. However, the mandatory traceback regulation continues. There appears to be no incentive to return to the regulation and abolish all that is now found to be costly and ineffective. The assumption that only a few flocks would be involved was wrong. The protocol in the regulation is outdated.

These mistakes are costing egg producers millions of dollars by requiring a choice between flock depopulation and diversion of high quality eggs from premium to discounted markets where eggs are unnecessarily broken and pasteurized.

There are four important lessons to be learned from this real world case. First, impact statements are important in determining whether the proposed regulation will cause more harm than good. We should change or do away with those regulations whose impact proves to be greater—or the benefit less—than predicted in the

statement. If the determination that no impact statement was required proves wrong, the agency should review cost versus benefits.

We recognize that impact statements are not simple applications of known quantitative representations. The world changes. The problems that we address are dynamic in nature and so too are the costs that are related in the regulatory impact. This bill should require a periodic revisiting of the premise posed and the supporting analysis.

Secondly, H.R. 9 calls for a description of any alternative approaches that were considered. I believe that government's first approach to a problem should be the coordination of voluntary, cooperative programs before concluding that a regulation is required. Our experience, involving several agencies, found that type of program to be much more efficient and effective than the uncompromising hammers of broad, mandatory requirements. The marketplace provides an extremely strong incentive for industry to do the right thing if the economic process is permitted to operate.

Regulations must be science based as well as economical. We should not regulate based strictly on theory. As assumptions prove incorrect, regulations must be revisited for change or for cancellation.

And finally, regulations should enforce proven standards and practices. This is the legitimate purpose of a regulation. They should not be used to compel industry to carry out actions that are ineffective or have no unknown consequences.

We thank the committee for taking the time to look into this matter of impact statements. Industry truly has in its best interests to do what is best for our customers. Sometimes, especially under very difficult circumstances, we need government's help in finding solutions. I believe it is better, much better, to join with government in fighting a problem that is facing both of us than it is to fight government because of a bad regulation. It would be my hope that this bill would encourage such cooperation before regulation is necessary.

Thank you.

Mr. GEKAS. Thank you. Your written statement will be accepted for the record without objection.

[The prepared statement of Mr. Wenger follows:]

PREPARED STATEMENT OF AL WENGER, WENGER FEEDS, AND CHAIRMAN OF THE BOARD, EGG ASSOCIATION OF AMERICA

Egg Association of America represents more than 75% of the egg production of the northeastern U.S. and we appreciate the opportunity to comment on H.R. 9's Title VII dealing with regulatory impact analyses. This is a matter very important to our industry and we have some recent experience that may help your consideration of this legislation.

In 1990, USDA issued an emergency regulation (9 CFR 82 Docket No.88-161), commonly referred to as the "Se trace back regulation" to control the growing incidence of human outbreaks caused by the bacteria *Salmonella enteritidis* (Se) in fresh eggs. This regulation was written by USDA after consulting with industry and other Federal agencies. We agreed with the procedures called for in the regulation and, although we disagreed with the determination that it was not a major rule, we saw the need to move ahead with control measures.

After a year of operating under the regulation, it was clear that the regulation was not getting the desired results—namely reducing the number of outbreaks of human illness attributed to this bacteria. Moreover, we were learning that the problem was larger and more complex than originally thought. For example, more than 3 billion eggs have been diverted from their normal markets, several million birds

have been disposed of, and one company went out of business—yet we had not learned anything about controlling SE. We could see no end to the problem.

In 1992, after year-long discussion among industry, government, and several universities, we developed a voluntary, cooperative field research program called the SE Pilot Project. More than 7 million egg laying hens have been enrolled for the purposes of testing eggs and the layer house environment, and for reviewing management and scientific procedures. From this effort a huge store of new scientific information emerged that has proven much of the original thinking-antiquated and in some areas simply wrong.

The voluntary approach worked. In 1994 SE outbreaks were little more than a half of those experienced in previous years. *To date there has not been a single confirmed incidence of a flock enrolled in the SE Pilot Project being implicated in an outbreak.* Other voluntary programs, following the protocol of the SE Pilot Project, have been started in New England, New York, and California.

However, the mandatory trace back program continues. There appears to be no incentive to return to the regulation and abolish all that is now found to be costly and ineffective. The assumption that only a few flocks would be involved was wrong. The protocol in the regulation is outdated. The regulation is unfair in that being implicated in an outbreak depends more on food preparation procedures than on the producers' practices. These mistakes are costing egg producers millions of dollars by requiring a choice between flock depopulation or diversion of high quality eggs from premium to discounted markets where the eggs are unnecessarily broken and pasteurized.

There are four important lessons to be learned this real world case.

First, impact statements are important in determining whether the proposed regulation will cause more harm than good. We should change or do away with regulations whose impact proves to be greater—or the benefit less—than predicted in the statement. If the determination that no impact study was required proves wrong, the agency should review costs versus benefits. We must recognize that impact statements are not simple applications of known quantitative representations. The world changes—the problems we address are dynamic in nature—and so too are the costs related to the regulatory impact. This bill should require a periodic revisiting of the premises posed and supporting analyses.

Secondly, H.R. 9 calls for (paragraph 7004(c)(8)) a description of any alternative approaches that were considered. I believe that government's first approach to a problem should be the coordination of voluntary, cooperative programs—before concluding that a regulation is required. Our experience, involving several agencies, found such programs to be much more efficient and effective than the uncompromising hammers of broad, mandatory requirements. The marketplace provides an extremely strong incentive for industry to "do the right thing" if the economic process is permitted to operate.

Regulations must be science-based as well as economical. We should not regulate based only on theory. As assumptions prove incorrect, regulations must be revisited for change or cancellation.

Finally, regulations should enforce proven standards and practices. This is the legitimate purpose of a regulation. They should not be used to compel industry to carry out actions that are ineffective or have unknown consequences.

We thank the Committee for taking the time to look into this matter of impact statements. Industry truly has in its best interests to do what is best for our customers. Sometimes, especially under very difficult circumstances, we need government's help in finding solutions.

I do believe it is better, much better, to join with government in fighting the problem facing us both than to fight government because of a bad regulation. It would be my hope that this bill would encourage such cooperation before regulation is necessary.

Mr. GEKAS. And now Mr. Dunkelberger.

#### STATEMENT OF EDWARD DUNKELBERGER, GENERAL COUNSEL, NATIONAL FOOD PROCESSORS ASSOCIATION

Mr. DUNKELBERGER. Thank you, sir.

My name is Ed Dunkelberger. I am general counsel for the National Food Processors Association. We very much appreciate this opportunity to testify today on title VII of H.R. 9, and in particular on the regulatory impact analysis requirements that would be incorporated by reference into the Administrative Procedure Act.



If I may, I will merely highlight my written statement.

More than 20 years ago, at the 1974 Agriculture and Food Economic Conference called by the White House, this association proposed that for all new government controls that the benefits be evaluated in terms of their real cost to the economy and consumers. The association and its members were thus quite gratified that shortly after the 1974 economic summit, President Ford promulgated the first Executive order to require consideration of the cost impact of all major regulations.

NFPA, of course, welcomed these and subsequent directives requiring agencies to undertake a regulatory impact analysis for major rules. The principal shortcoming of these Executive orders, however, has been that agency compliance with the requirements of these orders has not been subject to judicial review proceedings initiated by those who would be affected in some way by the regulations.

As we read section 7004 of title VII, the requirement of a regulatory impact analysis for proposed and final rules would be incorporated by reference into section 553 of the APA. Accordingly, an agency's compliance with the RIA requirement would, we submit, be subject to the same degree of judicial review that is applicable to the other procedural requirements of the APA.

In order to avoid any possible misunderstanding in this regard, however, we propose that the regulatory impact analysis requirements described in section 7004 be written directly into section 553 of the APA.

I heard Ms. Katzen's testimony and I recognize there is some concern about this judicial review approach. Maybe it will take some tinkering, but we emphasize and make clear in our statement that without judicial review you get exactly what you have now, and that is lipservice by government agencies to the regulatory impact analysis requirement.

We propose that one additional factor be considered for inclusion in the RIA. President Reagan's Executive Order 12630, I think issued on the same day as his regulatory impact analysis order, requires that Federal agencies evaluate the extent to which their regulatory actions will adversely affect constitutionally protected property rights.

The required agency consideration of "takings," as it is known in constitutional jargon, has heightened the public awareness of the extent to which government actions can deprive citizens of valuable property interests. We urge that section 7004 be amended to require that the RIA identify the takings implications of each proposed major rule.

We understand later parts of H.R. 9 address to some extent the takings issue, but those subsequent titles of the bill do not address the need in the RIA itself for the takings issues to be identified.

Our conclusion that a regulatory impact analysis requirement should be embodied in the APA itself is perhaps best illustrated by a fairly recent experience of the food industry in a massive rule-making proceeding undertaken by the Food and Drug Administration to implement the Nutrition Labeling and Education Act of 1990. In publishing rules to implement NLEA, FDA undertook compliance with the Executive order still in effect, President Rea-

gan's Executive order, by publishing a 20-page regulatory impact analysis of the proposed food labeling rules. The rules themselves with their preamble took literally hundreds of pages in the Federal Register.

This association presented comments setting forth the basis for our conclusion that FDA had substantially underestimated the food industry's costs of complying, and we proposed regulatory alternatives that would lessen the massive burden on the industry and ultimately on the cost to consumers. FDA's final analysis took some account of the food industry's submission, but we remain convinced that the cost to industry and the public would significantly exceed FDA's estimates, and I think experience has proven that out.

Of even greater concern, however, was FDA's failure to coordinate its regulatory impact analysis with many of the provisions in the final regulations. For example, in the final regulatory impact analysis, FDA retained its exaggerated estimate of the health benefits in terms of saved lives that would result from health claims on food labels, claims that would familiarize consumers with the health issues raised by various food constituents so that people could improve their diets.

FDA made several billion dollar estimates, or multibillion-dollar estimates in terms of benefits from these health claims on food labels. But, in fact, the restrictive approach it took in its regulations severely restricted the viability of health claims on food labels. This total disconnect between the regulatory impact analysis and the rules themselves was apparently of little concern to FDA since there was no statutory basis for an industry challenge to the validity of the analysis.

Enactment of title VII amendments would make clear to agencies that they can no longer give lipservice to a cost-benefit analysis and proceed to promulgate rules that fly in the face of that analysis.

Another more current example of the need for imposing an RIA requirement by statutory directive in the APA, rather than by a toothless Executive order, is the proposal just published by the Food Safety and Inspection Service of the USDA to adopt a massive new regulatory regime for the meat and poultry industries. This will cost, by their estimate, over \$2 billion to the industries, and that, of course, is their conservative estimate.

In view of the very substantial cost impact that this rulemaking will have on industry and consumers, it is vitally important that USDA be held accountable for preparing a comprehensive and factually supportable regulatory impact analysis. The enactment of title VII of H.R. 9 will significantly help to assure that result.

Finally, one issue not addressed in the regulatory provisions of the bill, and which we believe deserves consideration by Congress at an early date, is the growing concern about what has come to be known as government by consent decree. This issue was flagged by Congressman McIntosh in his statement.

Under this practice, Federal agencies may seek to perpetuate their regulatory programs well into the future by entering into consent decrees in order to settle litigation with private parties. Since such a consent judgment, which is merely rubber stamped, or virtually rubber stamped by a judge, becomes binding upon the agen-

cy and the public, the agency is not free to change it because it becomes a binding judgment. Thus, the agency that signs the consent agreement and its successors in future administrations are totally helpless to change it.

We respectfully request that this committee consider in the near future an amendment to the APA that would prohibit any agency from agreeing to and would prohibit the court from approving a consent judgment that would impose upon the agency the obligation to take any rulemaking or further action more than 18 months after the consent judgment is entered.

The sole intent of this amendment is to prevent an agency from unreasonably constraining its own future discretion and that of its successors by agreeing with a private party plaintiff to a consent judgment that imposes judicially enforceable obligations and deadlines on the agency well into the future.

Again, we very much appreciate this opportunity to testify on title VII.

Mr. GEKAS. Your statement will be accepted without objection for the record.

Mr. DUNKELBERGER. Thank you.

[The prepared statement of Mr. Dunkelberger follows:]

PREPARED STATEMENT OF EDWARD DUNKELBERGER, GENERAL COUNSEL, NATIONAL FOOD PROCESSORS ASSOCIATION

My name is Edward Dunkelberger. I am General Counsel for the National Food Processors Association (NFPA). NFPA is the science-based association of the food industry whose 500 members manufacture the nation's processed packaged fruits and vegetables, juices and drinks, meat and poultry, and specialty products.

NFPA very much appreciates this opportunity to testify today on Title II of H.R. 9, and in particular on the Regulatory Impact Analysis (RIA) requirements that would be incorporated by reference into the Administrative Procedure Act (APA). This Association has been a vigorous advocate of meaningful regulatory reform for many years. Indeed, more than 20 years ago, at the 1974 Agriculture and Food Economic Conference called by the White House, NFPA proposed that for all new government controls the "benefits be evaluated in terms of their real cost to the economy and consumers," and that Congress enact legislation "establishing a mechanism by which the consumer cost of any proposed program can be determined and balanced against the benefits to be achieved."

The Association and its members were thus quite gratified that shortly after the 1974 Economic Summit, President Ford promulgated Executive Order 11821 to require inflation impact statements for all major regulations and legislative proposals, including consideration of the cost impact of such proposals, their effect on productivity and competition, and their effect on supplies of important products and services. Succeeding executive orders, promulgated by every president thereafter, have built upon these principles to require preparation of regulatory impact analyses for proposed and final regulations identified as having major economic consequences to the general economy, or for individual industries, geographic regions, or levels of government.

NFPA of course welcomed these directives requiring agencies to undertake a regulatory impact analysis for major rules. We came to realize, however, that the effectiveness of these orders would fall far short of their intent unless agencies could somehow be held accountable for their failure to comply. A United States Court of Appeals held that persons adversely affected by a final rule could not object to such action on the grounds that the agency did not adequately comply with the requirements of President Ford's Executive Order. Subsequent executive orders refined and made more explicit the RIA requirement, but each of them provided, in essentially identical terms, that "this Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person." (See, e.g., E.O. 12291, ¶ 9.)

In view of our concern that the absence of effective judicial review would severely undercut any meaningful impact that these executive orders might have upon agen-



cy action, NFPA undertook to draft, propose and support legislation that would write a regulatory analysis requirement directly into the Administrative Procedure Act. For example, NFPA testified before Senate and House Committees in 1979 in support of regulatory reform legislation, spelling out in some detail the provisions that we believed should be included in such amendments. Attached to this statement is a 1979 summary of the NFPA testimony on H.R. 3263, detailing the regulatory analysis provisions that we believed to be necessary for meaningful regulatory reform. The Committee will see that there is a remarkable similarity between the provisions that we urged for adoption in 1979, and many of the provisions that are included in Title VII of H.R. 9.

It is important to make clear, as we did in the 1970's, that NFPA's support for the inclusion of regulatory analysis provisions in the Administrative Procedure Act is not intended to undercut the effectiveness of federal statutes and regulations designed to protect public health and safety. Accordingly, we have never urged that a cost-benefit analysis requirement be imposed in such a way as to override the health and safety standards written into a number of laws and regulations.

We have proposed, however, that Congress might require something more than merely directing that agencies prepare and publish a regulatory impact analysis. For example, we have supported legislation directing that federal agencies carefully consider during the rulemaking process the direct and indirect effects of federal rules on the private sector and state and local governments. A requirement that agencies "carefully consider" these effects would obviously not require that agencies give inappropriate emphasis to economic effects or costs. Quite clearly agencies would remain obliged to give effect to the statutory standards contained in the law which they are implementing. If the statute in question contains standards that allow for consideration of economic or technological feasibility, or similar public interest factors, then the RIA would contribute significantly to the final agency decision. On the other hand, the economic consequences of a health or safety regulation would not be intended to override or impinge on the fundamental statutory purpose, but the agency would be required to analyze projected economic effects and to give these some consideration in developing regulatory priorities, formulating specific requirements, choosing among alternative approaches, and establishing deadlines. We do not propose that a cost-benefit ratio or risk-benefit standard be made applicable to every regulation, but only that agencies be required to determine the projected economic consequences of major rules, and to give consideration to these consequences when the statute in question can be reasonably interpreted to authorize that approach.

Accordingly, we urge that the Committee give serious consideration to including in proposed new subsection 553(f) of the APA, as it would be added by section 7004 of Title VII, a requirement that agencies not only prepare a regulatory impact analysis for proposed and final major rules, but that the agency give careful consideration to the analysis in formulating its final rule. This approach would preserve the safety and health standards embodied in many federal statutes, and at the same time assure that costs and other economic consequences will be given at least some consideration in the development of final rules.

As I have said, the principal shortcoming of the executive orders that have required some form of cost-benefit analysis since 1974 has been that agency compliance with the requirements of these orders has not been subject to judicial review in proceedings initiated by those who will be affected in some way by the regulations. As we read section 7004 of Title VII, the requirement of a regulatory impact analysis for proposed and final rules would be incorporated by reference into section 553 of the Administrative Procedure Act. Accordingly, an agency's compliance with the RIA requirement would, we submit, be subject to the same degree of judicial review that is applicable to the other procedural requirements of the APA. For example, courts have remanded final regulations in the course of judicial review when they found that the agency statement of basis and purpose required by the APA was inadequate, inaccurate, or in some other way failed to provide the necessary explanation and support for the rule. In the same way, we believe that failure of an agency to comply adequately with the requirements for a regulatory impact analysis spelled out in section 7004 of Title VII would warrant a remand of the regulations by the reviewing court.

In order to avoid any possible misunderstanding in this regard, however, we propose that the regulatory impact analysis requirements described in section 7004 be written directly into section 553 of the Administrative Procedure Act. We have no objection to giving statutory effect to President Reagan's Executive Order 12291, as provided in section 7004, but we respectfully submit that the importance of the RIA requirements warrants their direct inclusion in the APA. In this way it would be absolutely clear that the preparation of a fully complying RIA is a procedural re-

quirement imposed by the APA directly upon agencies, and for which they may be held accountable in the course of judicial review of final rules.

The regulatory impact analysis requirements prescribed in section 7004 appear to us to be appropriate for consideration in the promulgation of major rules. The list of factors is considerably more detailed than those contained in President Reagan's Executive Order, but we do not believe that they would impose an undue burden on federal agencies. The core of the RIA will continue to be the assessment of the costs and benefits expected to result from adoption of the rule, and that obligation is currently imposed by executive order.

We propose that one additional factor be considered for inclusion in the RIA. President Reagan's Executive Order 12630 of March 15, 1988 requires that federal agencies evaluate the extent to which their regulatory actions will adversely affect constitutionally protected property rights. The required agency consideration of "takings" has heightened the public awareness of the extent to which government actions can deprive citizens of valuable property interests. We urge that section 7004 be amended to require that the RIA identify the takings implications of each proposed major rule.

Other provisions of Title VII should contribute significantly to the effectiveness of the regulatory impact analysis requirement. Of particular importance is section 7005, which would prohibit an agency from adopting a major rule unless the final regulatory impact analysis is approved in writing by the Director of the Office of Management and Budget or by his designee. It is vitally important that major rules that will significantly impact the public be subject to centralized review and approval at the White House level. Judicial review can play an important part in assuring that agencies will meet their obligations to comply with the RIA requirement, but considerable litigation, cost and delay can well be avoided if agencies understand that they must first demonstrate compliance to the Office of Management and Budget before proceeding to publish a final rule. It will be substantially more efficient if the agencies understand that they must comply in the first instance with the regulatory impact analysis requirements, and an effective OMB review should play an important role in that regard.

We also support section 7007, which requires that the Director of OMB submit a report to Congress within two years after the date of enactment of Title VII, containing an analysis of rulemaking procedures and of the impact of those rules and procedures on the regulated public and the regulatory process. This should assure that all three branches of the federal government—the executive, the judicial, and the legislative—will play an important role in overseeing the rulemaking process of federal agencies.

NFPA also supports the requirement in section 7002 that agencies publish an advance notice of proposed rulemaking at least 90 days before publishing a proposed rule. This notice will assure that those who will be affected by a proposed regulation will be given adequate prior notice, along with an explanation of the necessity and reasonableness of the rule, a description of the conditions that the rule will address and how they will be affected by the rule, and a description of alternative approaches that might be considered.

NFPA also supports the requirements of section 7003 that, upon the request of a substantial number of interested persons, agencies must hold a public hearing on a proposed rule. We understand that this hearing would be informal in nature, but it would provide an opportunity for those interested in or affected by the rule to make their views public and to benefit from the testimony of others at the hearing. We also support the provision that would provide for an additional 30-day period for comment, when requested by a significant number of persons. In general, agencies have been willing to provide such extensions, but this practice has not been universally observed. It is not unusual for an agency to spend a considerable amount of time in developing a rule, and then to provide only a brief period for comment by those who would be directly affected.

#### INEFFECTIVENESS OF CURRENT REGULATORY IMPACT ANALYSIS REQUIREMENTS

NFPA's conclusion that a regulatory impact analysis requirement should be embodied in the Administrative Procedure Act is perhaps best illustrated by a fairly recent experience of the food industry in a massive rulemaking proceeding undertaken by the Food and Drug Administration (FDA) to implement the Nutrition Labeling and Education Act of 1990 (NLEA). In November of 1990 Congress enacted comprehensive amendments to the Federal Food, Drug, and Cosmetic Act to require nutrition labeling on virtually all foods, to define and regulate the use of terms characterizing the amount of nutrients in foods, and to authorize truthful and substantiated statements on labels concerning the relationship between a particular nu-

trient in the food and a disease. FDA was directed to publish proposed implementing regulations no later than November of 1991, and final regulations no later than November of 1992. FDA substantially met the first deadline by publishing proposed regulations with explanatory preambles in many hundreds of pages in the Federal Register of November 27, 1991. The agency undertook compliance with Executive Order 12291 by publishing a 20-page regulatory impact analysis of the proposed food labeling rules, and solicited comments on the rules and on the RIA.

NFPA undertook a conscientious effort to estimate total food industry cost of complying with the new regulations, including administrative costs, food nutrition analysis costs, label redesign costs, capital costs, label inventory losses, and printing costs. The NFPA comments on the RIA set forth the basis for our conclusion that FDA had substantially under-estimated the food industry's costs of complying with the NLEA, and we proposed regulatory alternatives that would lessen the massive burden on the industry.

FDA's final RIA took some account of the food industry's submissions, but we remained convinced that the costs to industry and the public would significantly exceed FDA's estimates. Of even greater concern, however, was FDA's failure to coordinate its RIA with many of the provisions in the final regulations. For example, in its discussion of benefits in the RIA, FDA stated that much of the benefits of the NLEA regulations would depend on how health claims are regulated. 56 Fed. Reg. 60869. A more permissive regulatory approach to health claims would result in more nutritious diets and in greater benefits in terms of estimate life-years saved. A more restrictive approach would discourage health claims on food labels and thus have less impact on consumer health.

The paradox embodied in the RIA accompanying the final rules was that FDA retained its exaggerated estimate of health benefits in the final RIA, but adopted an extremely restrictive approach in its regulation of health claims. This total disconnect between the RIA and the rules themselves was apparently of little concern to FDA, since there was no statutory basis for an industry challenge to the validity of the RIA. Enactment of the Title VII amendments would make clear to agencies that they can no longer give lip service to a cost-benefit analysis and proceed to promulgate rules that fly in the face of that analysis.

Another more current example of the need for imposing an RIA requirement by statutory directive in the APA rather than by executive order is the proposal just published by the Food Safety and Inspection Service of the Department of Agriculture to adopt a massive new regulatory regime for the meat and poultry industries. The USDA regulatory impact analysis estimates total costs of over two and a quarter billion dollars and total benefits of between six and twenty-four billion dollars. In view of the very substantial cost impact that this rulemaking will have on industry and consumers, it is vitally important that USDA be held accountable for preparing a comprehensive and factually supportable regulatory impact analysis. The enactment of Title VII of H.R. 9 will significantly help to assure that result.

#### PROPOSED ADDITIONAL AMENDMENT TO THE ADMINISTRATIVE PROCEDURE ACT

NFPA fully understands the need for each of the Committees considering various aspects of H.R. 9 to complete final action as quickly as possible on provisions subject to their jurisdiction. One issue not addressed in the regulatory provisions of the bill, and which we believe deserves consideration by Congress at an early date, is the growing concern about what has come to be known as "government by consent decree." Under this practice, federal agencies may seek to perpetuate their regulatory programs well into the future by entering into consent decrees in order to settle litigation with private parties. The effect of these decrees, which are approved by the court and issued as binding judgments, may be to commit the agency to undertake extensive administrative proceedings on a prescribed schedule over a number of years. Such a consent judgment, once issued, binds the agency to compliance, even though agency policy may change with new administrations or otherwise.

We respectfully submit that this Committee consider in the near future an amendment to the APA that would prohibit any agency from proposing, agreeing to, or submitting to the court, and would prohibit the court from approving, a consent judgment that would impose upon the agency the obligation to take any rulemaking or further action more than 18 months after the consent judgment is entered. Indeed, we would go further to provide that no consent judgment entered between January 1, 1995 and January 20, 1997, could impose any obligation on any agency to take any such action after the latter date.

This amendment would in no way restrict the authority of a court to enter a judgment in a fully litigated case that would require agency action after the prescribed times. In addition, the amendment would impose no restrictions on the discretion



of an agency to establish lawfully authorized schedules and deadlines for future agency action, subject to the authority of the agency subsequently to modify such schedules and deadlines through appropriate administrative procedures.

The sole intent of the amendment is to prevent an agency from unreasonably constraining its future discretion and that of its successors by agreeing with a private party plaintiff to a consent judgment that imposes judicially enforceable obligations and deadlines on the agency well into the future.

#### PROPOSED AMENDMENT TO THE ADMINISTRATIVE PROCEDURE ACT

Add a new section to read as follows:

In any civil proceeding (1) to compel agency action unlawfully withheld or unreasonably delayed, or (2) for judicial review of agency action, the agency shall not propose, agree to, or submit to the court, and the court shall not approve, a consent judgment that would impose upon the agency any obligation to initiate, continue or complete rulemaking proceedings, or to take any other agency action more than 18 months after the date that the consent judgment is entered, and in no event shall a consent judgment entered after January 1, 1995 and before January 21, 1997, impose any such obligation on the agency to take any such action after January 20, 1997.

Mr. GEKAS. Mr. Maher, on the question of the application that you and your colleagues in the same enterprise would file for a permit for dredging, you complain that in one instance, and properly so, that it took 3 years, I believe, for all of the ramifications of that application to be completed before you were permitted to dredge; is that correct?

Mr. MAHER. That is correct.

Mr. GEKAS. If we were to adopt this act, I am wondering how we could have helped you back then. Follow me for a moment, in filing the application, you still have to go through a bureaucracy, giving judicial review and doing some of the salutary things we do in this bill and in our whole concept, unless you can disabuse me of this, would not have helped you; unless we had a process whereby we would speed up the evaluating process in the particular agency, like the Army Corps of Engineers or EPA or whoever else might be involved. Do you follow what I am saying?

How would have H.R. 9, or an updated version of the regulatory flexibility and analysis, helped you back then?

Mr. MAHER. Well, there are numerous issues that came up during this process. Different agencies had different interpretations of regulations. There were changes in standards that were applied over the course of the 3 years. There was nothing that someone seeking a permit, and in the case of the Port of New York and New Jersey, it is the port authority that actually seeks the permits. We as tenants do not go through the process ourselves but we are the beneficial users of the facility.

But it was the confusion and the changing of standards that impacted the regulatory process, and it would seem to me if the regulatory agencies had to use some sort of a cost-impact analysis or other type of business-related evaluation of their procedures, that the process could be streamlined and the standards could have been determined long before the permits were being processed.

Mr. GEKAS. One benefit I would see automatically, as counsel is pointing out, that perhaps the various agencies involved in evaluating the application that you would be filing would check with each other and coordinate their own requirements so that they would

not be creating hurdles for you. I see that. However, I do not see how——

Mr. MAHER. There is also the problem of the change of standards. For instance, at the beginning of the process the acceptable levels of dioxin contaminants in the dredge material was 25 parts per trillion. But by the time the permits were to be issued, the standard had changed to 10 parts per trillion. And that caused a substantial delay in the process.

Mr. GEKAS. All right. But I am saying if our rules had been in existence then, that would have launched a cost analysis, benefits analysis; isn't that so?

Mr. MAHER. Yes.

Mr. GEKAS. And I suppose that would not have happened overnight even in our best circumstance.

Mr. MAHER. Of course this, as I realize, is not a forum discussing the dredging issue per se, but if there had been cost-benefit analysis, the standards that were finally determined might very well have been different, because the——

Mr. GEKAS. That is what I was getting at.

Mr. MAHER. The standards that are being applied are different; they are standards that, I think in other circumstances, in other cases, would be deemed to be somewhat excessively stringent.

Mr. GEKAS. When they issued this mud proportion thing that you were talking about?

Mr. MAHER. Yes.

Mr. GEKAS. If our bill had been in existence, would you have been in a position, or your colleagues, to challenge that at that time?

Mr. MAHER. Yes, I would think so.

Mr. GEKAS. Is that what you are seeking—the opportunity to challenge these superficially, artificially imposed standards?

Mr. MAHER. Yes, to challenge early in the process and not later in the process when the process becomes delayed.

Mr. GEKAS. So that if you had been able to do—so at the outset of the promulgation of those standards and regulations, when the time came for your permit, it might have been done in a week?

Mr. MAHER. Yes, right.

Mr. GEKAS. The application for your permit?

Mr. MAHER. Yes.

Mr. GEKAS. That is what we are driving at; that is what we are talking about here.

Mr. DUNKELBERGER. Could I interrupt a minute, Mr. Chairman? Ms. Katzen's testimony suggested that to get a sweetener approved by the FDA, you would have to go through this process.

Mr. GEKAS. That is exactly correct.

Mr. DUNKELBERGER. And your bill is carefully crafted. It talks about rulemaking and general rulings of future applicability. In this example, if you have an agency setting the standards broadly, then that is where the cost-benefit analysis would be useful. When you get down to giving a particular license and permit, those are excluded by the definition in the Administrative Procedure Act from rulemaking. So you are not going to have to have cost-benefit, detailed cost-benefit analysis every time you have a permit or li-

cense issued. That way the process can work quite rationally, I think.

Mr. GEKAS. All right. Mr. Hubner, you also are willing to endorse what we are doing here for what is called a major change?

Mr. HUBNER. Absolutely.

Mr. GEKAS. Yes, at the same time you would like to see some of the criteria for involvement lowered, that is, to \$100,000, I think you say?

Mr. HUBNER. Anything that brings government closer to the people, Congressman.

Mr. GEKAS. My gosh, we should end the testimony with that.

Mr. Wenger, I wanted to ask. That regulation which caused you that much trouble but which you solved with your colleagues in the industry and so forth. That is still on the books; is it not?

Mr. WENGER. That is correct, it is, and we are still bound by it, and despite the fact the agencies we are dealing with would love to disavow it.

Mr. GEKAS. If we pass this legislation, that regulation would still be on the books?

Mr. WENGER. We would like to encourage that this legislation include a revisiting so that as science continually catches up to or unveils nuances that they, too, would be able to be incorporated into the old regulation.

The regulation as originally written was done in our best intent, both ours and the Federal agencies. Our problem is that as science has continued to move on, as we have learned new management practices, the difficulty is going back and revisiting that regulation, as it is almost impossible to revisit the regulation to determine—in this case we were denied a major rule, when in fact we discovered the scope of the problem, it turned out to be one that would have qualified for a major rule.

Mr. GEKAS. I regret to announce my own visceral reaction to that. I do not believe we would be empowered with the passing of this to revisit all these regulations, including the mud thing or the egg thing or anything. We are really talking about prospectively proceeding to forestall the imposition of new and heavier and weightier types of regulations.

I guess the forum for trying to revisit a past regulation is for Congress to pass a statute dealing with that subject matter specifically or reordering the agency to promulgate new regulations or to remove old regulations. I do not think we address that directly here. In fact, I know we do not. But that does not mean we are not cognizant of the problem. In other words, if we pass this tomorrow, Mr. Wenger, that regulation that is so odious to you is still on the books.

Mr. WENGER. That is correct. But, again, back to a third or final point to be made is that regulations should enforce proven standards of practices, which is what my colleague to my left has said. When we have these standards and practices that are not proven and they change, we run into major problems with regulations that were written for a previous time when we have a dynamic marketplace that we are involved in.

Mr. GEKAS. And one assertion I want to make to Mr. Dunkelberger for his information, the subject matter of the takings,



about which you were concerned, is in title IX of H.R. 9, which is in another subcommittee. One of our big tasks is to coordinate all of the various titles with the committees that are working on those separately. But we want you to know your concern will be noted.

Let me ask you this, do you intend to testify before the committee—when do they—on Friday?

Mr. DUNKELBERGER. I will have to check with the association to see if they have that in mind.

Mr. GEKAS. If not, I would be willing to carry a written statement from your organization to the committee.

Mr. DUNKELBERGER. Certainly.

Mr. GEKAS. So that we can tie in your concern there.

Mr. DUNKELBERGER. Let me make clear, if I may, Mr. Chairman. That title deals with when people will be entitled to compensation from the Government for a taking. All I am proposing here is that the regulatory impact analysis identify provisions in proposed rules which themselves would result in the taking.

In the NLEA rules, for example, they were written in such a way as to deprive some people from being able to continue a brand name, which they had a great deal of goodwill in. That clearly results in a taking under established law, but FDA felt free to brush off that claim. We think at least the RIA should flag takings issues, and that is all we are asking of this committee right now.

Mr. GEKAS. We intend, insofar as we can, to tie in all of these various titles so that they will work with one another. But, with that, we thank the panel—no, excuse me, I do want to relinquish some of my time here first to the gentleman from Rhode Island, 5 minutes.

Mr. REED. Thank you, Mr. Chairman.

I want to thank the panel for their excellent testimony. I particularly want to greet Mr. Hubner, who is a distinguished corporate citizen of my district in Westerly, Rhode Island, and his plant in Newburgh is about 10 miles above my alma mater, West Point, so I have a close identity with both locations.

Mr. HUBNER. Come back and visit us.

Mr. REED. I would like to. For a football weekend.

One of my concerns, and this does not go to any sort of great theory but a sort of homely, commonsense approach, what is sauce for the goose is sauce for the gander; that if we open up these regulatory impact statements, the cost-benefit analysis, and then have judicial review, that I would think the environmental community or the food activist community would seize upon that procedure to litigate copiously and extensively the very issues we have talked about. What is the benefits, what is the cost.

And I think if we go into this regime, we have to go in wide eyed, knowing this is not going to be just a one-way street where regulations are going to be taken off because they do not work anymore and not promulgated because business has been able to talk about the cost and benefits.

In fact, Mr. Wenger, I would suspect getting your regulation off the books would be harder if this legislation was passed, because one point that could be contested would be the—I don't know what the appropriate adversary group to you is. Who could be against eggs?

Mr. WENGER. I would rather not name any. I can't imagine who they might be.

Mr. REED. I can't either, but let us hypothetically assume that they could choose to litigate extensively the cost, the benefits, the science, your conclusion about what is the proper science. I just want to make that point, because we are all terribly sympathetic to the costs that are imposed by regulations and Mr. Maher's dredging example is close to home.

Narragansett Bay is in my district, and we would love to be able to dredge it to get the ships from Halifax through Narragansett to North Kingstown, RI. But I think we should be very, very conscious as we go forward here that this could open up an opportunity for a lot of litigation and disputation without doing what you want to do, make regulations rational and effective and cost efficient.

I think I will just rest there, Mr. Chairman.

Mr. GEKAS. I thank gentleman.

Does any other Member seek recognition? Gentleman from Ohio.

Mr. CHABOT. I have a quick question for each of you, gentlemen. It is a little broader than the cost benefit. Do you have an estimate, what percentage, of your profit is eaten up by Federal regulations? Let us not worry about city or State or county at this point but just the Federal regulations, whether that be EPA, or whether it be IRS, et cetera, et cetera? I don't mean what taxes you pay but I am talking about just the paperwork involved. Do you have an estimate of how much you actually spend, not dollar amounts but, say, percentage?

Mr. DUNKELBERGER. I can give perhaps one example. I think that is a very difficult task, but the OSHA indoor air quality standard, I believe, would be illustrative. OSHA itself estimated that the IAQ standard would cost 1 percent of profits. Others have pointed out that if 1 percent of profits is lost through one rule by one agency, it does not take many agency actions to begin to accumulate and add up.

I do not know of any rigorous efforts to come up with a total cost of regulation, but I bet it has been done. If we can identify any, we will submit it for the record.

Mr. WENGER. It is a difficult question for our industry to answer because, if I have, for example, half a million chickens, and under this regulation I am brought in under this regulation because of an incidence of this bacteria, it may well affect as high as 20 percent of what my operating costs may be. Maybe higher. On the other hand, if I am not brought in under this, because I was fortunate enough not to be included because no bacteria was found on that premise, my operating cost would be affected at something like 5 percent.

I might also mention in the industry of agriculture, when you say what percentage of your profits, you are making a wide assumption that there are profits.

Mr. CHABOT. Right.

Mr. WENGER. The egg industry has, for example, operated below the profit level for the last 3 years, and the swine industry, which we are all so familiar with involved, has operated below that line of profitability for the last 2½ years.

Mr. GEKAS. That is why we are trying to bring back income averaging for them.

Mr. WENGER. Yes, thank you.

Mr. MAHER. I really do not know how to answer that question. In our business we are regulated, of course, by the Office of Safety and Health. We are governed by the Longshoremen and Harbor Workers Act and of course, as I have just discussed, we were affected by EPA regulations and the Corps of Engineers and Coast Guard and a whole host of others.

To say—I also agree with the gentleman on my right, profits is sort of an elusive thing in our industry as well. Certainly governmental regulation has a cost, and in our industry it is a significant cost, but to put a dollar amount specifically on it and even more so on unnecessary regulations that are maybe too stringent is even harder. But I will certainly try and if I can come up with something, I will be happy to submit it.

Mr. CHABOT. OK.

Mr. HUBNER. Congressman, I, too, do not have an exact estimate of what it costs my company in terms of percents or actual dollars. I would imagine, from what I can feel around the offices, that there are probably two people on the payroll who do nothing but take care of government filings and I suspect that is part of the regulations. I know it costs me a quarter of a million dollars to be fined \$11,000 by the EPA at the end of a 6-year wrangle on a politically generated problem. So that is not ongoing, thank the Lord.

But I had a small pile of contaminants to settle finally after 6 years and the pile was described in the paper that I signed and the measurement of the pile and the picture was given as I looked at it. I was not that familiar with it. My people were handling these things. I was outraged to find the pile consisted of an 18-inch diameter circle 1½ inches high. That is all.

Mr. CHABOT. Thank you very much.

Mr. GEKAS. Any other Member seek recognition? The gentleman from Illinois.

Mr. FLANAGAN. Good afternoon, gentlemen. Thank you for coming.

Mr. Wenger, I have a question for you. Who paid for the SE pilot project?

Mr. WENGER. The pilot project was paid by the U.S. Department of Agriculture to the tune of about \$4.5 million over 2½ to 3 years.

Mr. FLANAGAN. Who had oversight on that?

Mr. WENGER. The U.S. Department of Agriculture, FSIS.

Mr. FLANAGAN. And your trade association has significant input to that?

Mr. WENGER. Yes, we did. That was an interagency effort, I might also mention.

Mr. FLANAGAN. So you actually had corporate participation with an agency of the Federal Government accomplishing a goal?

Mr. WENGER. That is correct. It was a cooperative effort of an entire industry that volunteered a geographical part of that industry to serve as a laboratory for USDA to unveil the secrets that were associated with this bacteria.

Mr. FLANAGAN. Was this an extraordinary event?



Mr. WENGER. Yes, it truly was an extraordinary event working with agencies who were unable to work with each other, who were threatening an industry, and by a cooperative effort we were able to bring everybody focusing on a problem and then focusing on a solution rather than looking at the industry only providing a solution, looking at a single agency only providing a solution. We all ended up in the same room and were all held accountable for finding a solution and then we could. That was certainly one of the most difficult issues that had faced our industry in the last decade, which included the losses of our industry marketing area.

Mr. FLANAGAN. I congratulate you by being able to tweak the Federal Government to create a major issue where they otherwise would not have. You have accomplished something that few could.

The fact that you can do it stands as a testament to the fact the Government is willing to accomplish things. They just need to be tweaked accordingly so we do not all look like bureaucracy heretics here. We all know we can provide a good service. They just need to be driven into it.

But that brings me to a question for Mr. Hubner and Mr. Maher. Both of you spoke in your testimony about government-private cooperation and perhaps what Mr. Wenger experienced is just such cooperation, and for looking for or perhaps something deeper I wonder if either or both of you could expand on that in a little bit in light of title VII.

Mr. HUBNER. Well, thank you. I think we have an opportunity somewhere in studying these regulatory impact items to seriously change the way government operates with its people. I have stated some of the horror-type stories. But why not, why not take this opportunity, happily brought about rather quickly last November, to respond to the needs of not only businesspeople but the small taxpayers who are also beset and upset with the way Federal regulations impinge upon their lives?

Would it be so shocking to have partnerships of the regulators with the people who are regulated; that, let's say you can think of any of the meeting times that might be necessary or want to, but once a month, forever, at different levels of the Government or different levels of businesses or with business associations with the regulator for that, let's say, the chicken people with chicken regulators, textile people with textile regulators.

I only bring it up—I could not flesh it out for you, but with so many people thinking seriously of how to respond to the constrictions and the metal cobwebs that have been put on growth in these last many years by regulations, it would seem to me that we could come up with something that is quite happy to contemplate.

Mr. FLANAGAN. I understand your disaffection, particularly with your own difficulty, and I do realize that we are talking about a fundamental change from an adversarial role to a cooperative one.

Mr. HUBNER. Indeed.

Mr. FLANAGAN. Because it was not designed to be adversarial, I would bet that is true. I bet it was designed to be cooperative and helpful to the business, to the public, and to taxpayers as well. I was wondering if maybe either of you had a for instance.

Mr. HUBNER. Well, you know, Congressman, and Chairman Gekas has suggested how terribly difficult it might be to look at

present regulations that attempt to roll back, which I would think would be a happy thing, but I know how hard it would be. But at least possibly look at how regulations have been implemented in an adversarial way and attempt to at least assuage that adversarial regulation—excuse me, adversarial attitude without affecting the regulations.

Regulations can be good as well as bad, we know that. It is just that they have been enforced in an adversarial and arrogant, oftentimes, without due process way. And it might be a lot easier to do that than to go after the regulations themselves.

Mr. MAHER. As I said before, our company and our industry is accountable to a number of different agencies and a number of different types of regulatory processes. Some that do not even exist for others such as the Waterfront Commission of the New York and New Jersey Harbor. And if I understand your question, I can think of a for instance where our industry and our company work very well with, for instance, the OSHA department of the Department of Labor.

Safety is very important in our business. It means, of course, the health and safety of the people that work there plus many dollars to the industry itself, and we have had great success in working with the Department of Labor in that area; getting together before regulations are promulgated, discussing the effects of the regulations and, of course, in the end, when the regulation is put forth, we have to live with it, whether we like it or not, but we believe we have had a lot of success in that area.

I think that the problem, at least from my perspective, and I am kind of cognizant of what Congressman Reed said before about the question of judicial review and is title VII going to create more of a monster than already exists. We have, we already have a lot of judicial review, and now, in the case of the dredging issue, we are getting a judicial review after the regulatory process. So that we have had the situation where the agencies involved do not seem to be able to get their act together for a couple of years and when they finally did get their act together then the environmental groups go to court and try to stop whatever it is, whatever the permit is.

That is what happened to us in the Port of New York and New Jersey. So I would hope that title VII, with its judicial review, would require that this process took place before the regulation was issued. So that when the agencies did their job and issued their permits or issued their determinations that the judicial review at that point in time would be somewhat limited.

Mr. FLANAGAN. Thank you, gentlemen. Thank you, Mr. Chairman.

Mr. GEKAS. The gentleman from Georgia.

Mr. BARR. Thank you, Mr. Chairman.

I very much appreciated both the oral and written testimony of the witnesses here. I think it is very, very helpful to hear from folks that are answerable to the people, your shareholders, your employees, your constituents, your customers, and so on and so forth. I think a lot of folks up here in Washington sometimes are under the impression or choose to be under the impression that businesses are not accountable to the people and you are.

And I appreciate some of the specific examples that you set for us here today that illustrate some of the problems that we are trying to deal with here.

The question of how to measure the benefit of something in a cost-benefit analysis that we have been speaking about is, obviously, somewhat difficult to get a handle on. I am just wondering if any of you would have any principles of measurement from your own business or industry that might help us in that regard?

Mr. WENGER. I might just take a quick shot at that. Because I think someone else noted that quantifying costs is—maybe it is not simple, but at least we can always come up with what the cost may be. The benefit analysis is always much more difficult.

I think I was alluding to that in the statement, that a lot of what we are talking about here is not quantifiable. And we are talking about benefit—what is the benefit of not losing the confidence of a consumer over a problem that can be controlled with proper regulation and input by the Federal Government, working cooperatively with industry?

I don't know how to put a dollar figure on that. I do know the confidence of the American consumer is something that we all strive for as Congressmen and as businessmen. And I don't know what value you would put on that. Perhaps the cost of the campaign. Maybe that is quantitatively. But I don't know how we can put a real dollar value to that.

It is the value of my business. It is the value of our industry in many cases. It is that large a number. We talk about the loss of trust of the consuming public.

Mr. BARR. The reason I ask that is, as we go through this process and develop the legislation, we want to make it as strong as possible in anticipation of challenges that it is vague and ambiguous, for example. And if I could, Mr. Chairman, ask any of these witnesses if you do have any further guidance as you think about this, in light of the language that we are proposing here, that would help us avoid some of those court challenges once we enact this, which I hope we will. It would be much appreciated if you could submit that to us.

Mr. DUNKELBERGER. Congressman Barr, if I could.

If you look at the regulatory impact analysis for the one I referred to, the NLEA regulations, they do undertake a comprehensive evaluation of benefits, and they put dollar figures on them. And the economists—like it or not, I am no economist—come up with dollar figures for benefits in terms of lifeyears saved.

It is a common expression, and I think Ms. Katzen said, that benefits tend to be—I mean, costs tend to be specific and benefits vague; and, therefore, benefits come out on the losing side.

That is not my experience. My experience is the opposite. If you are trying to justify a regulation, agencies seem to have no difficulty whatever claiming benefits for the very reason that they are vague and cannot be computed. And it is not surprising that every time I have ever seen a regulatory impact analysis justifying a regulation, you get a nice, hard cost figure—right or wrong, we could argue about it—but surprise of surprises, the benefits are always huge.



Well, for example, for the megarule by USDA, they estimate benefits between \$8 billion and \$26 billion for this new regulation of the meat and poultry industry. Well, obviously, the costs they estimate are like \$2 billion or \$3 billion, and there you go.

So I agree with you. It is an issue that has to be looked at and how you try to hold them accountable. My only answer is—being a lawyer I guess it is self-serving—but my view is that, without judicial review, as difficult and as problematic as that is, without it, agencies can say anything they want and not be held accountable. I have never seen OMB step in after the fact and say, well, you screwed up the RIA.

Mr. BARR. Thank you. Thank you, Mr. Chairman.

Mr. GEKAS. I thank the gentleman. And I thank the panel. We will take your suggestions seriously and your description of the problems that you are facing seriously. Thank you very much.

The next panel brings two historic figures, maybe a third one. Where are these historic figures? Mr. Boyden Gray and Mr. Jim Miller, along with David Hawkins. We invite you to come forward.

What makes this panel a little bit special to us is that both Mr. Gray and Mr. Miller, as historians will recall, were a part of the Reagan administration when indeed the Executive order, about which we speak and which the audience has heard many references to, was the product of the joint efforts of the White House under President Reagan and Mr. Miller and Mr. Gray in specific terms.

Where are you now, Mr. Gray?

Mr. GRAY. I am back at my old law firm, and I am also Jimmy's successor as chairman of Citizens for a Sound Economy.

Mr. GEKAS. Very good.

And we know where Jim has been and is working steadily. When you were with the Office of Management and Budget (OMB), Jim, was that one of your duties? To help craft that Executive order?

Mr. MILLER. Well, I will tell you. The brief history of the Executive order is that during the Reagan-Bush transition, Boyd and I, along with some others, were assigned to work on regulatory issues, and we sat down one day and identified two things: One, you have got to give the regulators some guidelines. That is to the extent that the law affords some discretion, tell them specific things they should do, and specific things they should accomplish. And two, write those things down.

So we wrote very simple, straightforward rules. They were: first of all, don't regulate unless you have sufficient information; and, secondly, try to incur the lowest possible cost while pursuing any regulatory objective, and so forth.

Those are very straightforward, common-sense rules, the kind of decisions that people make daily. And that is what was put in the Executive order that Boyd and I crafted along with Justice Department within a month of the commencing of the Reagan administration.

Mr. GEKAS. Very good. With them is David Hawkins, a senior attorney with the Natural Resources Defense Council, an organization well-known for its involvement in environmental issues and in defense of the environment in general terms.

Why don't we start with Mr. Gray and work our way over to Mr. Miller.

**STATEMENT OF C. BOYDEN GRAY, PARTNER, WILMER,  
CUTLER & PICKERING**

Mr. GRAY. Thank you, Mr. Chairman. I think that you have my statement, so there is no point in—

Mr. GEKAS. Without objection, we will accept it for the record.

Mr. GRAY. I would like just to make into a summary of it—three fairly basic points.

There are, given the three branches of government, three opportunities to contain the so-called fourth branch; namely, the regulatory agencies. There are three ways to do it. Congress can go back in and change the law; the courts can review and throw out for failure to meet the statutory standards or for exceeding jurisdiction; or the President can come in and better manage his own executive branch.

And that is what the title VII is directed at, the last of the three. It is often the most overlooked, in terms of its role, the White House's role, but it may be the most effective because it is quick. It doesn't take years in litigation, and it doesn't get tied up in the kinds of difficulties the Congress can run into, calendar and whatnot. So I believe it is something that is very, very important.

I believe it is lacking in the title III portion of H.R. 9, the question of Executive Presidential oversight. And that is what this remedies, and I applaud the committee for doing it.

As someone who, with Jim, had a big hand in the drafting of 12291 it is also, I suppose, in a funny sort of way, historically flattering; but I must hasten to add that you must, as you acknowledge you must already, integrate this with title III. And so whether word for word, 12291 is codified is not important. But the question of Presidential oversight is absolutely critical.

One of the points about a congressional oversight that I want to make is that committees and subcommittees can get tied up with industries or with sectors of the economy. A President never can. He has to answer to too many people to be caught by one particular constituency. He is the only person along with the Vice President, who is elected by everybody and, therefore, provides unique perspective on these issues.

The second point I want to make is that the Executive order that Jim and I worked on years ago made only passing or almost a cryptic reference to two important points—risk assessment and market-based incentives—which later got fleshed out in guidance documents issued by OMB that were never put into the Executive order. Now, obviously, title III is going to deal with risk assessment.

I would just like to say one word here about market incentives. I have been struggling with Mr. Hawkins here to my left on these very issues before EPA in the last few months. But take the acid rain experience—whatever anyone may think about the ultimate goal of reducing acid rain 50 percent, leave that to one side. Congress having made a decision to do that, it is almost a miracle what has happened with the innovation of allowing the marketplace to do the enforcement by privatizing enforcement.

The statute talks of the cost per ton of compliance being \$1,500 a ton. In fact, the trades in the open market now are at or below \$150 a ton, which means that the cost has been cut by 90 percent,

and the environmental cleanup is about 40 percent ahead of the statutory schedule.

Now, if you can get 140 percent of your goal at one-tenth the cost, you are doing all right. And that is something I wish and hope that you and the other committees dealing with titles III and VII will not overlook.

Finally, I just want to make another mention about the integration with title III. There has been discussion in your committee already about judicial review. I believe it is an issue that is difficult to deal with, but I hope you will deal with that, plus the consent decree problem. They are related. And if you are going to deal with one, you might as well try to deal with the other.

I don't have any specific answers on the consent decree problem, but I do believe that it is important to make, at the very least, the regulatory impact analysis and the factual data that go into those part of the administrative record, and important, at least to some minimal degree, to make a decision about cost and benefits available for judicial review.

As has been pointed out by other witnesses, the Executive order we drafted said no judicial review. That is for two simple reasons: One, Presidents can't confer jurisdiction; only you can do that. And, secondly, we didn't want to make some of the details about how the President interacts with agencies themselves procedurally subject to judicial review. That would really tie up the process. We didn't want that to happen.

But the underlying substance of what goes on in reaching these decisions, that ought to be at least part of the record, at least available for review. That is a problem with title III as well, and I hope the two committees can work their way through it.

I would be happy to answer questions, but I don't want to take anymore of your time.

[The prepared statement of Mr. Gray follows:]

PREPARED STATEMENT OF C. BOYDEN GRAY, PARTNER, WILMER, CUTLER & PICKERING

Good Afternoon. Mr. Chairman and members of the Subcommittee. My name is C. Boyden Gray. I am a partner at Wilmer, Cutler, and Pickering and I am Chairman of Citizens for a Sound Economy, a 250,000 member grassroots organization that advocates market-based solutions to public policy problems. I appreciate the opportunity to comment on Title VII of the "Job Creation and Wage Enhancement Act of 1995," (H.R. ), which is a fundamental element of the Contract with America. The regulatory reforms contained in H.R. 9 provide the necessary tools for easing the regulatory burden on American consumers.

Excessive regulations impose significant costs on U.S. economy—higher prices for consumer goods and services, fewer jobs, less innovation, and higher costs of production for American companies in the global marketplace. Cost-benefit analysis and other regulatory reforms such as risk assessment are vital tools that allow a more accurate assessment of the regulatory burden imposed on consumers by the federal government. Executive Order 12291, issued by President Ronald Reagan in 1980 formalized cost-benefit analysis for federal regulations by establishing a regulatory review process premised on the notion that the benefits of regulation should exceed the costs of regulation.

Importantly, Executive Order 12291 also established presidential regulatory oversight of agency rulemakings. The Office of Information and Regulatory Affairs (OIRA) was given a central role in the regulatory review process. Not only does OIRA review agency regulations to ensure that benefits are greater than costs, but OIRA also provides guidance for agencies and ensures consistency across the government on regulatory issues. President Clinton continued these functions with Executive Order 12866, although the new order introduced changes that may weaken



the regulatory review process. Title VII of H.R. 9 would re-establish the importance of centralized regulatory review by writing Executive Order 12291 into statute and expanding it to include the independent agencies. This would be an important step towards rationalizing the regulatory process and eliminating costly regulations that provide consumers few, if any, benefits.

### CONTROLLING THE REGULATORY BURDEN

The effective use of cost-benefit analysis has provided dramatic benefits for consumers in the area of economic regulation. In the transportation sector alone consumer welfare increased more than \$30 billion through deregulation. When examining health and safety regulations, which are the fastest growing sector of the federal regulatory program, the job of identifying regulatory reforms is more complex. By the year 2000, the cost of complying with environmental regulations alone is estimated to be more than \$185 billion annually. Regulatory review will play an important role in ensuring these regulations provide benefits to society. In assessing the problem, let me step back and discuss briefly the three basic means of ensuring effective oversight of federal regulatory activities:

*Congressional Oversight.* Congressional hearings and the legislative process are an important method for reviewing federal regulations. However, in some instances, statutes are vague for various reasons (some good and some bad), and they leave a large degree of bureaucratic discretion. Oversight hearings can identify the regulatory problems that arise in these cases. But legislative solutions may be difficult and time consuming to achieve, particularly when there are jurisdictional questions that create overlapping mandates for federal agencies or when Congress is out of session.

*Judicial Review or Legal Remedy.* In cases of excessive or conflicting regulations, concerned parties have traditionally sought relief through the court system. Litigation is often an expensive and lengthy process, however, with high transaction costs. Because Reagan-Bush regulatory review was based on an executive order, it was not possible to include judicial review in the review process. H.R. 9 presents an opportunity to do so, or at least to provide that the regulatory impact analysis and its findings that benefits outweigh costs be included in the record for purposes of judicial review. In this regard, it is important to integrate the overlapping provisions Title VII with Title III of H.R. 9.

*Presidential Regulatory Oversight.* Although frequently overlooked by the Congress, presidential oversight of federal agencies is perhaps the most effective way to control the federal regulatory burden. Presidential oversight is required to ensure that agency policies are consistent with the law and administration policies. Together with Congress, the president uses legislation to delineate the regulatory responsibilities of the various agencies. The president also has a constitutional obligation to manage the executive branch. Presidential regulatory oversight is a large part of this duty, and Executive 12291 provides the tools to carry out this function.

Executive Order 12291, which I was glad to help create, established a formal mechanism for centralized review within the White House. The review process evolved from tools used by earlier presidents to assess the regulatory output of the federal agencies. Where not prohibited by law, Executive Order 12291 improved the rulemaking process by allowing a second opinion on regulatory activity. The regulatory burden was reduced in a number of areas, and I would be happy to provide the committee with information on the billions of dollars in savings generated by the executive order.

Through OIRA Administrators such as Jim Miller, Chris DeMuth, Wendy Gramm, and others, the president was able to have a large impact on the regulatory program. The president has a broader constituency than the narrow interests entangled with one particular agency and OIRA was positioned to review regulations from this broader perspective. This not only ensured consistency with the administration's policies, but also provided an opportunity to review the cost-benefit analysis generated by the agencies. To the extent that Title VII of H.R. 9 codifies this process, it provides a useful mechanism to identify and revisit costly regulations before they are imposed on the American public.

A couple of other points are important to make here. First, it is probably better to codify the order rather than direct the president to adopt it. Second, Title VII of H.R. 9 covers too many rules, diluting OMB's effectiveness. Third, the bill itself lists too many overlapping factors that must be considered. These can be narrowed and better focused; I would be happy to provide suggested language in this regard.

## STRENGTHENING CENTRALIZED REVIEW

Despite the successes of Executive Order 12291, however, there are important elements of the regulatory review process that were not included in the executive order, namely, risk assessment and market-based incentives.

Risk assessment is vital complement to cost-benefit analysis that provides the basis for determining whether regulations are even required. Risk assessments, effectively done, must identify hazards, determine the degree of risk, and allow comparisons to other potential hazards. When based on sound science and full information, risk assessment provides information that can be used to evaluate a regulation's cost-effectiveness. In 1983 a set of principles were adopted with respect to risk assessment, but they were never formalized in an executive order. Consequently, the principles of risk assessment were not a consistent element of the review process. H.R. 9 should elevate requirements for risk assessment through a statute. Title III does this, and as I said earlier, the two titles must be integrated.

If adopted, however, a risk assessment statute should include a centralized review mechanism similar to cost-benefit analysis. This is currently lacking in Title III of H.R. 9. To the extent possible by law, the president and his science advisers should have oversight authority for agency risk assessments. In addition, any risk assessment legislation should permit public comment on the tools used in calculating risk.

In addition to risk assessment, regulatory reform legislation should also include a requirement that federal agencies rely on market-based incentives where possible. Market incentives often achieve regulatory goals much more cheaply than command-and-control regulations by allowing individuals and businesses to develop more flexible responses to regulatory requirements. Through exchange and entrepreneurial activities regulated entities can comply with federal regulations in a more cost effective manner.

For example, in the early 1980s, the EPA used a market-based approach for reducing the amount of lead in gasoline. Refiners and importers could trade lead credits to comply with a uniform lead-content standard. The program achieved savings of more than \$250 million.

The acid rain trading program in the early 1990s provides an example of even more striking savings through the use of market-incentives. By establishing an allowance market based on trading, regulatory objectives were achieved at a greatly reduced cost and much quicker than was possible using traditional command-and-control regulatory policies. The acid rain program established a cap on SO<sub>2</sub> emissions and instituted a marketplace to trade emission permits. The cost per unit of emissions was initially established at \$1500 per ton. However, through market trades, significant innovations have emerged and the cost has fallen to \$150 per ton, saving consumers billions of dollars. In addition, the clean up is 40 percent ahead of the statutory schedule.

The results of these market-based approaches to regulation must be heeded. Today, the air is cleaner, the reductions are cheaper, and there is less litigation than typically associated with command-and-control regulation. At the same time, market-based regulations provide incentives for innovation and flexibility that allow the regulated sectors to achieve regulatory objectives in the most cost-effective manner, thus balancing the reforms that risk assessment will have on the benefit side of the equation. H.R. 9 should, therefore, include requirements for federal agencies to rely on market-based incentives rather than command and control wherever possible.

When reforming the regulatory process, one further concern is the impact of consent decrees entered into by federal agencies. In many instances agencies enter into consent judgments with private plaintiffs that impose restrictions on regulatory action far into the future. Consent decrees impose judicially enforceable obligations and deadlines on regulatory agencies that limit proper regulatory oversight of rule-making activity. H.R. 9 provides an opportunity to address these constraints on the rulemaking process.

## CONCLUSION

H.R. 9 is an important step towards codifying important elements of the regulatory review function. The cost-benefit requirements in Title VII of the Act provide an important tool for centralized regulatory review. Presidential oversight in the regulatory process plays a role more important than merely coordinating policies across agencies and ensuring consistency with administration policies; such oversight provides a check on regulatory excesses by requiring agencies ensure the benefits of regulations exceed their costs. Legislative support of this effort would be useful. Thank you, Mr. Chairman. I would be happy to answer any questions at this time.

Mr. GEKAS. Mr. Hawkins.

**STATEMENT OF DAVID G. HAWKINS, SENIOR ATTORNEY,  
NATURAL RESOURCES DEFENSE COUNCIL**

Mr. HAWKINS. Thank you very much, Mr. Chairman.

I am David Hawkins, and I work for the Natural Resources Defense Council. NRDC is an organization that has worked for the last 25 years to promote a healthy environment and an environment that preserves the bountiful resources that America has been blessed with. NRDC also supports a strong economy. We recognize that economy and environment go hand in hand. They can and they should work in harmony, and we support policies that try to promote those objectives as harmonious ones rather than as conflicting ones.

I am here to tell you that we oppose enactment of H.R. 9, including title VII. We do so because, while many of the complaints about regulation deserve a response, H.R. 9 is a response that in our view will not work and in our view will do much unintended damage as well.

One of the problems with H.R. 9, frankly, is the speed with which it is being considered. Your subcommittee and the full committee and perhaps the floor of the House will be voting on this measure before its impacts have been analyzed.

We are not aware of the Congressional Budget Office or any other office actually being asked to analyze the impact of this legislation on the agencies whose behavior it seeks to modify. We think that is a fundamental, wise thing to do, to analyze the impact of the legislation. Indeed, one of the premises of H.R. 9 is that, before the Government acts, it should analyze what it does. I think that is a lesson that should be applied to the drafting of this legislation itself.

Unfortunately, we don't have an analysis to comment on, so we can't enlighten you with our views of whether the analysis is helpful, comprehensive or perhaps misses some points.

Mr. Chairman, you mentioned to the earlier panel and also to Ms. Katzen that many complaints have come in from people subject to regulations. And, of course, you should listen to those complaints. It is very important that you do so. It is important that you understand those complaints.

We would hope that, as well, you would ask the agencies that have been the object of those complaints to explain their actions, thus giving you a fuller picture of the nature of these controversies. It may be possible to design more effective remedies. Without having the explanation from the agencies, what you are left with is the complaints and with no real sense of why those events occurred.

In addition to getting an explanation from the agencies, you should, of course, seek to design programs and measures that will make the agencies more responsive. We don't think that H.R. 9 will do that, unfortunately. We think that what H.R. 9 will do is burden the agencies with analytical requirements which, while appropriate in some circumstances, will be applied to all circumstances.

The major rule definition of affecting 100 people essentially will require these detailed analyses for every single rule. In our view, it will require analyses that will spend more taxpayer dollars for



some rules than could possibly be saved by any change in the rule itself, including a decision not to issue the rule. That is not a wise use of agency resources which are, in turn, all of our resources, taxpayer resources.

Moreover, while creating a much greater workload for agencies, other provisions of H.R. 9, such as title IV and title V, establish sharp cutbacks in resources to the agencies to be able to deal with those increased workloads. Title IV establishes a regulatory budget cap which will kick in a sharp set of reductions in staff and personnel and contractor resources to the agencies. Title V requires information collection requests to be cut back by 20 percent over the next 4 years.

Under H.R. 9 there may be a tenfold increase in the number of analyses that agencies are asked to perform. How are they going to manage that combined with a 20-percent reduction in the information they can collect? Analysis isn't possible without information.

Some health risks are difficult to quantify, even when they are real and can be reduced. One of the concerns we have with H.R. 9 is that the emphasis on quantification may make it difficult for EPA or other health agencies to respond when they should respond, and we would encourage you to think about that.

Another point I would like to mention is the litigation potential. We have no difficulty with an agency being asked to explain its decisions. We seek to have agencies explain their decisions in the work that we do. We think it is important, and we think that courts have a role in judging the adequacy of agency's explanations of their decisions.

We read H.R. 9, however, as creating an entirely different potential for litigation, and that is challenges to agency rules at their preliminary stages, challenges at the proposal stage, because of a claim that the agency has failed to accompany the proposal with the necessary analytical components specified by H.R. 9. That would clog the courts if it occurs, and it would delay agency decisionmaking—specifically, court litigation could go on at the proposal stage with the potential for the agency being told to go back to go and start the whole process over again.

Another point I would like to touch on is the OMB veto power that is in title VII. It is striking to us that in a statute which seeks to impose accountability on executive branch agencies that OMB is given the power to veto rules through absolute silence, through no accountability whatsoever. The absence of action by OMB will veto a rule, and that seems to me to be in sharp contrast to the principles of accountability that this committee would—or the authors of the bill would seek to impose on executive branch agencies.

Why shouldn't OMB have to explain its actions? There could be a rulemaking process that has gone on for several years. It could achieve consensus among all or nearly all of the parties. It could be accompanied by the most elaborate of risk analyses and cost-benefit analyses and could enjoy broad support. But under the provisions of H.R. 9, OMB could prevent it from being issued simply by taking no action and offering no explanation.

We are concerned also by provisions in the bill that allow OMB to keep communications secret, communications that may come

from special interests and responses that may respond to those special interests. If that is to occur, those communications should be open and shouldn't be kept confidential. That, again, is a central element of an accountable process.

Just another quick point. A concern we have is that H.R. 9 mandates risk assessments on a case-by-case basis. Boyden Gray has brought up the subject of acid rain, and I agree entirely with his description of the acid rain program. It is very effective. It is a working market system. It is a market system that has accountability built into it, information-gathering built into it.

I worked on developing the rules as a member of the public with industry, with EPA and with the States; and we got those rules out in record time; and it allowed the program to move forward. If the agency had had to do a case-by-case risk assessment of those rules, which they would have had to do if H.R. 9 had been law, those rules might not be in place today because of the incredible difficulty of doing a risk assessment for an ecologically complex problem like acid rain.

Moreover, such a case-by-case risk assessment would have been a waste of agency resources because Congress had already made a policy decision that this was a risk it wanted the Government to take action to deal with. It had spelled out a precise environmental target in the law. It had spelled out a mechanism for allocating responsibility to achieve that target to the regulated entities. There was no need for a risk assessment because Congress had considered all of those factors in adopting the legislation itself.

Finally, I just would like to comment on the primacy that H.R. 9, apparently, would give to cost-benefit analysis and the requirement in Executive Order 12291 that all rules seek to maximize net benefits to society. Our concern with this is that, in giving primacy to that particular objective of cost benefit and net benefit maximization, H.R. 9 may force agencies to ignore or discount other important social values, such as individual rights, such as equity considerations, such as the impacts of different policies on how costs and benefits and risks and harm are distributed among the public at large.

Ours is a country that respects individual rights, and I know all of you do, too. And many of those rights we do not condition on an analyst being able to decide that the information before it says that the benefits outweigh the costs. Some of those benefits associated with individual rights aren't subject to be taken away because of some calculus that the costs warrant taking them away.

And yet H.R. 9 would apply that type of test to all statutes, apparently, including statutes that have recognized the primacy of individual rights such as civil rights laws. These are very important considerations. If H.R. 9 intends to sweep away the values that are embedded in existing environmental safety and civil rights laws, it should be done in a much more clear fashion; and it should also be done with a much greater public debate than is occurring.

Thank you very much for your attention.

[The prepared statement of Mr. Hawkins follows:]

PREPARED STATEMENT OF DAVID G. HAWKINS, SENIOR ATTORNEY, NATURAL  
RESOURCES DEFENSE COUNCIL

Thank you for inviting the Natural Resources Defense Council (NRDC) to testify today on Title VII of H.R. 9, titled the "Administrative Procedure Reform Act of 1995." NRDC is a national membership organization, founded in 1970, dedicated to protection of human health and the environment.

NRDC has worked on behalf of its members, which number about 150,000 people throughout the United States, to carry out goals that the American public strongly supports: environmental quality that is free from manmade threats to human health and that preserves and enhances the wonderful diversity of natural resources with which America has been blessed. Like the American public NRDC also strongly supports a healthy economy and the opportunity for all to prosper in material and other ways. We believe that Americans want their government to help achieve these goals in concert, not to pursue policies that set one goal against the others.

America's environmental quality is among the best in the world. We have made enormous progress in reducing health risks and restoring our air and water over the last quarter century, due in very large part to landmark environmental laws passed by Congress since 1970. But now these laws and that progress are in jeopardy because of a set of hastily-constructed and hastily-considered proposals before this Congress.

Of course, government should be designed to pursue health, safety, and environmental goals efficiently. But there is more to these goals than improved economic efficiency. Preventing pollution, making workplaces safer, treating natural resources with respect are actions we take to promote other values: values to defend individuals from harm caused by others; values that help define a shared sense of behavior that is right and wrong. We believe these values are embedded in the environmental and safety laws that Congress has passed. Government decisions to promote the health, safety, and environmental goals of those laws must incorporate these policy values.

Mr. Chairman, members of the subcommittee, NRDC opposes enactment of H.R. 9. We do so because we believe it would prevent government from acting to prevent serious harm to health, safety, and the environment and we believe H.R. 9 fails to respect the values that underlie Americans' desires for a clean environment and safer workplaces.

#### 1. H.R. 9 WILL PREVENT THE GOVERNMENT FROM FUNCTIONING

Supporters of H.R. 9 say their purpose is to ensure that government acts in a more considered fashion, with greater emphasis on participation by affected persons, gathering and analysis of information, and selection and design of actions that are efficiently tailored to solving the problems they address. Our objection to H.R. 9 is not with these principles; it is with the fact that H.R. 9 itself fails to respect these principles.

We should not forget that in drafting a new law Congress is taking government action. Unless done carefully, that action can be as heavy-handed as many of the often repeated regulatory "horror stories." H.R. 9 sets forth numerous requirements by which agency actions must be judged. How well does H.R. 9 fare when tested against these requirements?

#### H.R. 9: WHO KNOWS ITS IMPACTS?

H.R. 9 purports to promote broader opportunities for public participation—an objective we support—including requirements for public hearings, extension of public comment periods (§7003), and providing adequate notice of the nature and impacts of proposed actions in a clearly readable form (§7006).

But how much public notice of Title VII's regulatory impact analysis provision do you feel has been provided by including it in a 122 page bill called the "Job Creation and Wage Enhancement Act of 1995"?

What analysis has been done of the costs to the government—which means the costs to the taxpayer—of the analytical requirements of H.R. 9? What analysis has been done of H.R. 9's effect on government's ability to make timely decisions to respond to needs of the public or of a regulated person?

Most bills with the potential impact of H.R. 9 are analyzed by one of the support arms of the Congress—Congressional Budget Office (CBO), Congressional Research Service (CRS), or the Office of Technology Assessment (OTA). We are not aware of any analyses of H.R. 9 by these bodies. Have any of them been asked to assess the cost of compliance with the bill?



We are also concerned about the majority's stated intentions to pass H.R. 9 in the first 100 days of this Congress. As I discuss below, the implications of H.R. 9 deserve a broader opportunity for public discussion and participation than this schedule permits. The public deserves a clear and objective description of the contents of H.R. 9, an analysis of its impacts, and a reasonable opportunity to give you views on the bill's merits. These things have not been provided to the public.

Section 7004(c) of H.R. 9 requires agencies to accompany proposed actions with a long and specific list of statements and analyses, among them the following:

An explanation of the necessity, appropriateness and reasonableness of the rule.

A description of the current condition that the rule will address and how that condition will be affected by the rule.

A statement that the rule does not conflict with nor duplicate any other rule, or an explanation of why the conflict or duplication exists.

A statement of the factual, scientific, or technical basis for the agency's determination that the rule will accomplish its intended purpose.

A demonstration that the rule provides the least costly or least intrusive approach for meeting its intended purpose.

Is it not reasonable for the process of considering H.R. 9 to be informed by at least some of the information required by the above items, so that your decisions may serve as a model for the type of government process the bill seeks to establish?

Do members of this subcommittee feel that H.R. 9 has chosen the least costly and least intrusive approach for meeting its intended purpose? Do you feel you have been given adequate information even to assess whether this is true?

#### H.R. 9 IS REGULATORY OVERKILL

To test the reasonableness of H.R. 9, I urge you to substitute the words "major product" for "major rule" and "private firm" for "agency" in Title VII. Would you seriously consider a bill that would impose H.R. 9's procedural and paperwork burdens and litigation prospects on every private firm that sought to introduce a product that might affect more than 100 people? I think you would not. I think you would conclude that H.R. 9's sweeping requirements would prevent even the largest firms from bringing useful products to market without crippling delays.

If an H.R. 9 for the private sector were before your committee, you would probably kill it outright. If not, you would certainly narrow its applicability, provide for screening procedures to assure that significant procedural and analytical requirements were imposed only when the potential harm avoided bore some reasonable relationship to the clearance burdens imposed by the law, and assure that decision-makers were afforded the flexibility to consider a full range of relevant factors when making their decision.

Some might say, "we're just giving the government a taste of its own medicine." But the public will get this medicine, not just the "government." The regulatory agencies targeted by H.R. 9 are taxpayer-supported firms that the public expects to act in a timely and appropriate fashion to prevent damage to health, safety, and the environment from actions that the market by itself fails to prevent. In writing legislation, you are the corporate managers for these firms—establishing standards and practices that should be aimed at assuring a high degree of quality control for their products.

No private firm would set out to make a product and then establish a maze-like quality control regime that made it impossible to produce the product. But that is what H.R. 9 does. I have attached a flow chart prepared by EPA showing the complex process mandated by H.R. 9. The bill's provisions show a complete indifference to the impacts of its "quality control" procedures on the ability of the agencies to do what the public is paying them to do: to protect the public from harm to health, safety, and environmental values.

H.R. 9 applies a one-size-fits-all package of impact analyses and risk assessment procedures to essentially all actions taken in the health, safety, and environmental sphere. Title VII's definition of "major" rule—any rule affecting more than 100 persons or imposing a cost of more than \$1 million on a single person—would require extensive regulatory impact analyses (RIA) for nearly every action. EPA has concluded that while 20 of its rules under the Clean Air Act impose most of the costs of that law (and are already subject to RIAs), H.R. 9 would expand the number of

required RIAs to 169, an 8-fold increase in taxpayers' resources for just this one program.<sup>1</sup>

The RIA requirements are not the only costs imposed by H.R. 9 of course. EPA estimates that the risk assessment procedures of Title III will expand the number of major risk assessments from 38 per year now to 2631 under H.R. 9. Browner letter, attachment at 4. Moreover, Title VII expands the risk assessment requirement of Title III to virtually all health and environmental protection actions.<sup>2</sup>

EPA estimates that because of H.R. 9's extremely broad coverage, the agency would need to add 980 employees (a 140% increase in staff now doing analyses) and \$142 million in contract and research dollars annually (a tripling of costs for contracts and research). Browner letter, attachment at 17.

H.R. 9 makes the mistake of concluding because some analysis is good, more analysis is better. In so doing, the bill would waste taxpayers' money. Because of the 101 person test in §7004, the bill will require lengthy and costly studies for many rules that impose very small costs on society and for some rules that save money by streamlining existing requirements. EPA estimates that it will cost taxpayers about \$1.6 million for each RIA and risk assessment required by H.R. 9. Browner letter, attachment at 13. Under H.R. 9 the government could be forced to spend more taxpayers' money to analyze a rule than could possibly be saved by any change in the rule, including a decision not to issue it.

Title VII's RIA requirements have the potential to require analysis without limit. For example, §7004(c)(8) requires a description and explanation of the agency's failure to select any alternatives suggested by interested persons. This broad requirement, especially when combined with the ability to litigate, could create an open-ended burden on agencies to discuss alternatives without regard to their appropriateness or reasonableness.

#### MORE PAPERWORK DEMANDS BUT FEWER RESOURCES: THE VISE THAT WILL KILL TIMELY HEALTH, SAFETY, AND ENVIRONMENTAL PROTECTION

H.R. 9 would do more than waste time and money. It would cripple the government's ability to act when the public needs it to act. EPA already takes about three years to adopt major rules. The combination of H.R. 9's added analytical requirements and the bill's required reduction in available resources will add years to the time that passes before EPA can act; if it can act at all.

The bill's new hurdles may prevent EPA from issuing many important health rules at all, due to an inability to quantify the number of cases of disease or death that will be prevented. EPA has identified several serious health risks that it might be prevented from addressing on a timely basis if H.R. 9's quantification mandates were law today:

the drinking water contaminant *Cryptosporidium*, a cause of widespread illness and some deaths in Milwaukee: quantification of current levels in water and minimum dangerous levels is not good enough to meet H.R. 9's analysis tests;

the pesticide Dinoseb, a cause of birth defects and of sterility in men: EPA banned this chemical because of known harm but it could not quantify the number of men or babies who would be harmed;

the sterilizing agent, ethylene oxide, which poses risks of birth defects: EPA can not quantify the number of babies that would be born with birth defects. Browner letter at 6-7.

While Titles III and VII greatly expand the number of analyses EPA and other agencies must carry out—increasing studies by a factor of 8 or more—Titles IV and V will sharply cut the agencies' resources and tools for conducting these studies. Title IV would impose a dramatic annual reduction in agency resources and staff beginning the first budget year after enactment.<sup>3</sup> On top of that reduction, Title V

<sup>1</sup> Letter from Carol M. Browner, Administrator, EPA to Representative George Brown, January 31, 1995, Attachment at 12-13. ("Browner letter").

<sup>2</sup> Section 7004(c)(6) of H.R. 9 requires agencies to quantify risks to human health or environment, if practicable. This risk quantification requirement will trigger the risk assessment procedures of Title III for all health and environmental rules that affect more than 100 people. Title III, §3107 defines a "risk assessment" as a process of quantifying risks and §3103 applies Title III's requirements to all risk assessments done for federal health, safety, or environmental programs, regardless of the impact of the rule.

<sup>3</sup> Title IV imposes an arbitrary cap on the gross costs of all federal regulation of 5% of the gross domestic product. The cap is arbitrary and irrational because it completely ignores the savings that a regulation produces (e.g., reduced hospital costs and lost work days due to sewage treatment). The definition of "federal regulation" is so broad (covering the costs of paying minimum wages and apparently, even income taxes) that the cap would be broken immediately. This

requires agencies to cut back the information they collect from the private sector by 20% over the next four years.

However, agencies cannot carry out analyses without resources and without collecting information from regulated industries. The combination of H.R. 9's conflicting commands would have a predictable result. Agencies would be able to conduct only a small number of analyses in any year; to meet paperwork reduction goals, they would have to stretch out such analyses over several years. This would create congestion that would stack up rules for years; denying the public needed safeguards; creating uncertainty for industry, for nothing would be resolved quickly; and causing the agency to have to redo analyses because so much time would pass that their data would be stale.

I cannot think of anyone who would be well-served by such an impasse:

certainly not the public, who would suffer as a result of agency inaction;

not industry, which would have to live with longer periods of uncertainty, be unable to get timely answers from government, and which would be exposed to the likelihood of an eventual spasm of frustrated demands for rapid government correction of such a sorry state of affairs.

#### JOB CREATION AND WAGE ENHANCEMENT FOR LAWYERS

H.R. 9 does not contain any express limitation on the ability to bring suit for an alleged violation, of the many new analytical duties created by the bill. This raises the potential for a flood of actions that will clog the courts, imposing real harm to others with more legitimate grievances.

Title VII appears to invite litigation when rules are first proposed, as well as when they are finally issued. Section 7002 requires agencies to precede proposed "major" rules by at least 90 days with a notice of intent. Can suit be brought to enjoin publication of any proposed rule that has not been preceded by such a notice, based on a claim that the rule is, or should have been, classified "major"? Can suit be brought to invalidate a rule *at the proposal stage*, based on any of the following claims:

that the RIA one of § 7004's 23 statements, descriptions, and demonstrations is missing or deficient?

that the rule is "likely to result in" an annual effect on the economy of more than \$25 or \$100 million, thus triggering Title III risk assessment requirements? that the rule is "likely to result in" a "major increase" in costs or "significant adverse effects" on one or more economic indicators, also triggering Title III requirements?

that the peer review of the cost and risk assessment accompanying a proposed rule is incomplete or flawed?

Section 3105 imposes a five-part documentation requirement on any agency statement characterizing risk. Section 3107's definition of risk characterization is sweeping; it may well include—

contaminated drinking water alerts,  
agency testimony to a committee of Congress,  
brochures on drunk driving, safe food handling, lead paint poisoning,  
small craft advisories,  
winter storm warnings.

Can suit be brought to enjoin the issuance of this type of information if the documents do not contain H.R. 9's required elements:

description of populations or natural resources at risk,  
description and probability of risk estimates,  
explanations of exposure scenarios,  
and comparisons with other familiar and routinely encountered risks?

#### § 3105.

Without an express limitation on judicial review, H.R. 9 is an open invitation for all of the above lawsuits and many others that will spring from our profession's boundless ingenuity. Not only would these actions burden the courts, they would put taxpayers through the expense of having agency rules cycled through repeated loops of "return to go" instructions and would further delay the government's ability to act when protection was needed.

#### OMB VETO: POWER WITHOUT ACCOUNTABILITY

H.R. 9 takes great pains to make other executive branch agencies accountable but provides OMB with the ultimate power to determine when and whether the govern-

would trigger sharp and continuing annual reductions in agency resources, staff, and authority to protect the public.



ment will act while at the same time requiring absolutely no accountability for OMB's decisions. Section 7005 of the bill prohibits an agency from adopting a major rule unless OMB has approved the RIA in writing.

Alone among government agencies, OMB is not required to explain its actions on rules. Silence on OMB's part can kill a rule, no matter how many peer reviewers, economists, physicians, and others have attested to its soundness in a rulemaking process that may have consumed years.

Adding to the just sense of unfairness that the veto provision would engender is OMB's ability to keep the pleadings of special interests and its responses a secret from the public. Under § 5305 of H.R. 9, communications between private parties and OMB can be kept secret based on claims of feared retaliation. Under § 5306 a request to kill an information collection request, which is critical to the effectiveness of many rules, can be granted by OMB and kept confidential at the request or's wish. Under § 7004(c)(23) agencies must inform parties that they can send comments directly to OMB but OMB is not expressly required to provide those comments to the agency or the public.

It is not possible to square the provisions for back-door dealings and unexplained vetoes by OMB with a professed interest in making government more accountable to the people.

## II. H.R. 9 IMPOSES A RISK-BASED STRAITJACKET AND IGNORES IMPORTANT HUMAN VALUES

In addition to its excessive scope, undue prescriptiveness, tendency to promote litigation, and invitation to special-interest fixes, Title VII of H.R. 9 appears to sweep aside the policy bases of many existing laws, replacing them with a narrow insistence that risk assessment and cost-benefit analyses are the sole legitimate factors that should determine government action. While these tools have a role to play in many government decisions, H.R. 9 would assign them a dominant, possibly determinative role in effectively *all* government decisions.

### INAPPROPRIATE MANDATES CASE-BY-CASE RISK ANALYSES

Section 7004(c)(6) of H.R. 9 requires agencies to quantify risks to human health or environment, when "practicable." This requirement is sensible for some programs but under H.R. 9 it is required even for programs where Congress has made an explicit decision to adopt other strategies that are not based on case-by-case risk quantification for each rule.

For example, in 1990 Congress adopted a technology-driven performance-standard approach to reducing toxic air pollutants from industrial sources. Congress did so after reviewing EPA's failure to achieve cost-effective feasible reductions in major toxic pollution exposures over the previous 20 years under a provision that relied on a rule-by-rule, pollutant-by-pollutant risk assessment approach. The rule-by-rule risk assessment approach didn't work in that context and Congress made a decision to use another strategy. Why require a wasteful case-by-case risk assessment for each of the rules needed to carry out this congressional decision? If Congress is interested in an evaluation of the *programmatic* risk reduction from the 1990 air toxics program there are much more efficient ways to provide such an analysis.

Other programs that the public values highly also pursue goals other than risk reduction. Restoration of the Chesapeake Bay and the Great Lakes and protection of visibility at the Grand Canyon are programs are obvious examples. Why should these efforts be tied to a risk reduction framework?

### H.R. 9 IGNORES OTHER IMPORTANT VALUES

Section 7004(c)(7) requires a "demonstration that the rule provides the least costly or least intrusive approach for meeting its intended purpose." While lower cost rules are desirable in principle, H.R. 9 appears to set up this factor as the deciding criterion. Such an approach leaves no room for considering other values and factors, such as distribution of impacts, equity, technical difficulty, ease of administration and enforceability. It begs the question of least costly for whom; least intrusive for whom? It leaves unanswered how to resolve conflicts between alternatives: less costly options may be more intrusive and vice versa.

Section 7004(c)(11) requires an evaluation of the rule's costs and benefits, including how the "benefits outweigh the cost." In addition, § 7004(a) imposes the requirements of the 1981 Executive Order 12291, issued by former President Reagan, on all agency rulemaking actions.<sup>4</sup> Section 2 of E.O. 12291 provides that all agency

<sup>4</sup> Coverage is extended to independent agencies by § 700(d)(2).

rulemaking actions "to the extent permitted by law, shall adhere" to five specific requirements. Among these requirements are the following:

no action to be taken unless "the potential benefits to society for the regulation outweigh the potential costs to society."

regulatory "objectives shall be chosen to maximize the net benefits to society;"

"the alternative involving the least net cost to society shall be chosen;"

agencies "shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society."

These commands of E.O. 12291 are sweeping directives to use a utilitarian system of a state-defined calculus of benefits for society as a whole, with no recognition of other values such as justice, equity, individual rights.

When written, E.O. 12291 acknowledged that Congress had passed laws to protect rights that are not dependent on a utilitarian calculus, for example, civil rights laws. What would enactment of H.R. 9 do to the meaning of the phrase "to the extent permitted by law" in E.O. 12291? Some are sure to argue that H.R. 9 not only permits but requires a showing that "benefits outweigh the cost" before any rule may be adopted. § 7004(c)(11). This would sweep away many existing environmental and safety laws, such as the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, that do not require agencies to condition the public's right to freedom from serious health risks on an accountant's conclusion that their lives are "worth saving."

E.O. 12866, the current executive order for regulatory review, expressly requires recognition of equity and the distribution of impacts in determining the benefits of a rule. E.O. 12866, § 1 (a). Why are these factors not mentioned in H.R. 9? I am certain that you would not want to prevent agencies from considering fairness and individual rights when deciding whether to act against threats to health, safety, or the environment. But by omitting such factors, H.R. 9 may force agencies to ignore these fundamental values.

Do the authors of H.R. 9 intend to erase the provisions of existing environmental laws that respect the rights of individuals to seek government action to protect their health from a factory's pollution? We hope not. If they do, such a major change in public policy deserves a much broader public discussion than it is receiving in the consideration of H.R. 9.

Requiring all decisions to be made solely on a cost-benefit basis ignores considerations of rights, fairness and equity. Such a fundamental modification of previous congressional decisions in landmark laws to protect health, safety, the environment, civil rights, persons with disabilities, child labor and other laws designed to secure individual liberties should not be made by reinstating a 14-year-old, rescinded executive order and inserting a provision in a 23 item list of factors for regulatory impact analyses buried in a 122 page bill called the "Job Creation and Wage Enhancement Act."

What must an agency show to prove that a rule which prevents job or housing discrimination achieves benefits that outweigh the costs? What is the going price that an employer or landlord can offer to pay in order to be free to discriminate in these areas? Can any degree of assault on a person's health due to pollution or workplace hazards be rationalized as acceptable based on a technical calculation that the benefits of preventing the denial of these rights do not outweigh the costs?

Americans reasonably expect their government to establish rules of behavior that do not tolerate the knowing infliction of harm on others. They will not agree that poisoning or maiming another is acceptable simply because some government analyst has estimated the costs of stopping the harm as higher than the value he assigns to the good health of the person who is harmed.

Perhaps it is not the intent of H.R. 9 to have cost estimates assume primacy over all other values that Americans cherish. But the bill as written would threaten those values by imposing rigid decision rules and by making it impossible for the government to act. We urge you to vote against reporting the bill.

Mr. GEKAS. Mr. Miller.

## STATEMENT OF JAMES C. MILLER, COUNSELLOR, CITIZENS FOR A SOUND ECONOMY

Mr. MILLER. Mr. Chairman, I have a statement that I have prepared with the assistance of my able associate, Mr. Wayne Brough, and I would like to submit that for the record.

Mr. GEKAS. We accept it for the record, without objection.

Mr. MILLER. Thank you, sir. I will try to be brief.

It seems to me that we really need to address things on two levels. One level is the nitty-gritty of getting agencies to do the right thing. With the broad discretion Congress gives agencies, they are likely to do things the wrong way. This is because, currently, regulatory agencies focus solely on issuing regulations, and not on cost-benefit analysis and the like. Therefore, you must give them some guidance.

The kind of guidance that is contained in Executive Order 12291 we thought was very much on the mark. Again, those guidelines were: Don't regulate unless you have requisite information. Don't promulgate a regulation unless you see that the benefits exceed the costs. Choose the least costly means of regulating.

These are straightforward, commonsensical rules. Most people—whether in business or in their private lives, deciding whether to drive on the left side of the road or the right side of the road, to use an extreme example—apply that kind of decision calculus themselves.

An institutional framework which requires the agencies to meet those kinds of guidelines and objectives makes an enormous amount of sense, and we believe made an enormous improvement in the quality of regulations when applied in the early 1980's. It continued to do so until agencies began to find ways around it and Congress gave them power to circumvent the requirements of the Executive order.

The other level is much broader. We know that the problem is not insufficient regulation. The problem is too much regulation. And we need to grab the agencies by the collar, shake them around, and let them know that business as usual is no longer acceptable. If you amend the statutes, of course you will do that. But you can do this in one stroke with the kind of legislation you have proposed.

The present Director of the Office of Information and Regulatory Affairs—as I pointed out in my testimony, I was the first Director of that Office—is a very fine, capable person. I think her objectives are noble beyond question.

The problem is that she is dealing with people in the administration who don't at all agree with the basic objectives codified in this legislation. I think we do have to get the agency's attention to get them to change.

Therefore, Mr. Chairman and members of the committee, I urge your favorable action on this legislation. I think other things need to be done; a regulatory budget, for example, and risk assessment. But telling the agencies you must, within the discretion afforded by law—and we need to change some of those laws—you must meet these objectives. And giving standing to someone to file suit against an agency if it doesn't meet those standards is long overdue.

Thank you.

Mr. GEKAS. We thank you for your testimony.

[The prepared statement of Mr. Miller follows:]

PREPARED STATEMENT OF JAMES C. MILLER, COUNSELLOR, CITIZENS FOR A SOUND ECONOMY

Good morning. Mr. Chairman and Members of the Committee: Thank you for the opportunity to present the views of Citizens for a Sound Economy, a 250,000 member-and-supporter advocacy group that promotes market-based solutions to public



policy problems. As you may know, I was the first Administrator of the Office of Information and Regulatory Affairs (OIRA), a post established under the Paperwork Reduction Act. Thus, I have a keen interest in regulatory review and Title VII of the "Job Creation and Wage Enhancement Act of 1995," (H.R. 9).

Each year, Americans pay a "hidden tax" of some \$500 billion complying with federal regulations. In addition, federal information requests impose a burden of more than six billion hours on consumers and businesses. The costs of excessive regulations and paperwork present a significant obstacle to economic growth while raising consumer prices and unnecessarily restricting consumer choice.

To address these problems, President Ronald Reagan issued Executive Order 12291, which required federal agencies to examine both costs and benefits when implementing new regulations. Executive Order 12291, authored primarily by Boyden Gray and yours truly, established a formal mechanism for centralized review of federal regulations. H.R. 9 builds on this process and codifies into law the requirements of Executive Order 12291 while expanding the requirements to the independent regulatory agencies as well. Favorable action on H.R. 9 will be an important step towards easing the federal regulatory burden.

President Bill Clinton acknowledged the importance of centralized review but altered the review process when he issued Executive Order 12866, Regulatory Planning and Review. The new measures introduced in the executive order may weaken effective regulatory oversight. The new executive order provides more leeway and discretion for federal regulators while establishing standards of review that are too inexact. The result may be the use of agency discretion to promulgate new regulations that impose costs far exceeding any benefits. H.R. 9 provides an opportunity to address this imbalance with tighter standards that will ensure the benefits of regulations exceed their costs.

#### THE ORIGINS OF CENTRALIZED REVIEW

As the federal government has grown in size and complexity, centralized regulatory review has become an integral tool of the executive branch's efforts to ensure that policies are consistent across agencies and reflect the administration's views. Increased levels of congressional oversight have made White House regulatory review even more important. President Richard Nixon's Quality of Life review was the first effort to coordinate regulations across agencies. These efforts at White House review were continued under President Gerald Ford through the use of Inflation Impact Statements. President Jimmy Carter then established the Improving Government Regulations Program, which relied on a number of offices within the Executive Office of the President to evaluate the impact and cost-effectiveness of regulatory activities. The current requirement for regulatory analysis on any rule with an impact of more than \$100 million on the economy was established under President Carter.

When President Ronald Reagan was elected, he established a more formal procedure for regulatory review and analysis. Executive Order No. 12291 required, to the degree permitted by law, that agencies base their regulatory decisions on simple rules: that they have sufficient information on which to base their decisions; that when alternative ways of securing a regulatory objective are available they choose the least-costly method; that when benefits do not exceed costs they do not go forward; and so forth. Executive Order 12291 was the foundation for regulatory review and analysis conducted throughout the 1980s and early 1990s.

Prior to President Reagan's executive order, regulatory analysis consisted of a description of the economic consequences of a rule, a description of alternative approaches to achieve the same regulatory purpose, and an explanation of why the chosen alternative was selected. President Reagan's review process provided the initial enforcement measures to require benefit-cost analysis as an integral part of the rulemaking process.

President Reagan's executive order played a substantial role in reducing the regulatory burden between 1980 and 1986. One proxy for the level of regulation—Federal Register pages—decreased from 87,011 pages in 1980 to 47,418 pages in 1986. At the same time, regulations reviewed by OIRA dropped from 2,765 to 2,007. However, these trends reversed in 1986 as Congress mounted pressure for additional regulations and as agencies learned to "game" the system. Federal Register page now have climbed to more than 67,000 pages—the highest level since 1980. In 1991, rules reviewed by OIRA had reached 2,388. Major rules—those costing more than \$100 million, or those with significant impact—jumped more than 64 percent from 1991 to 1992. During the Bush Administration, OIRA did not have a politically-appointed and Senate-confirmed Administrator, which may account for some of the increase in regulation. The Competitiveness Council, headed by Vice President Dan

Quayle, eventually moved to provide regulatory guidance for the administration, filling the void in leadership.

The Office of Information and Regulatory Affairs plays a crucial role in centralized regulatory review. Centralized review is invaluable for developing consistent standards for regulatory analysis that can be used to make comparisons of regulations across agencies. To facilitate this process, President Reagan issued Executive Order No. 12498 on January 4, 1985, which sought to improve executive branch regulatory decisionmaking and coordination. Under Executive Order No. 12498 each major regulatory agency developed a regulatory program outlining ongoing regulatory activities. This is reviewed by OIRA so that the administration could more effectively direct regulatory policies. In addition, the regulatory program provided Congress and the public an advance view of significant regulatory actions.

Through OIRA, consistent practices have been created for the use of benefit-cost analysis as well as the use of performance standards, both of which promote regulations that impose lower costs on society. Burdens on the economy are reduced further by OIRA's efforts to reduce excessive or redundant paperwork. The Regulatory Program of the U.S. Government and the Information Collection Budget, both of which have been issued annually by OIRA, provided valuable information concerning efforts to ease government burdens on the economy.

#### PRESIDENT CLINTON'S REGULATORY REVIEW PROCESS

Upon taking office, President Clinton expressed his concern for excessive regulation and the need for regulatory oversight. The President acknowledged the importance of OIRA but at the same time, he moved to distance himself from the controversies surrounding the Competitiveness Council. Accordingly, the President abolished the Council and set out to establish a new regime of regulatory review. These efforts came to fruition on September 30, 1993 when the President signed Executive Order 12866, "Regulatory Planning and Review." The new executive order revokes Executive Orders 12291 and 12498.

As with his predecessors, President Clinton has recognized the importance of centralized regulatory review. However, while he has indicated support for the principles of benefit-cost analysis, the new executive order contains modifications to the old approach that potentially weaken benefit-cost analysis. Moreover, agencies will play a more important role in the review process, with the ultimate effect that a lower percentage of rules will be reviewed by OIRA.

Under Executive Order 12866, agencies will continue to maximize net benefits, but the definition of benefits has been expanded to include "distributional impacts" and equity as well economic considerations. In addition, the concept of benefits has been further expanded to include non-quantitative benefits. These changes will provide agencies with more discretion during the rulemaking process. At the same time, executive office review of agency rulemaking by the Office of Information and Regulatory Affairs (OIRA) will be diminished, as OIRA will review only significant rules; the number of rules reviewed by OIRA each year is expected to drop by one-third.

In addition to the executive order, President Clinton issued three memoranda on agency rulemaking. One order called for agencies to streamline their internal review of regulations in order to expedite the review process. The second memorandum calls for each agency to review its regulatory activities and its interactions with OIRA for six months in order to develop a more effective rulemaking process. The final memorandum stresses the use of negotiated rulemakings as a mechanism of gaining more public input into the rulemaking process. It also calls for each agency to identify one rule for a negotiated rulemaking over the next year, or else explain why negotiated rulemaking is not feasible.

One of the most important changes in regulatory review is the use of a Regulatory Plan. In the past, each federal agency would produce an annual regulatory agenda to be submitted to the President twice a year. Under the new executive order each agency prepares a Regulatory Plan to identify significant actions in the upcoming year. This is the list of rules that will be sent to OIRA for review. Once the plan is issued, OIRA has 10 days to review the plan; it is then circulated for comment among the agencies, the Office of Management and Budget, and the Office of the Vice President. Some concerns have been raised that the 10 day time frame may not provide OIRA sufficient time to determine whether all appropriate regulations have been included in the plan.

The new executive order includes some positive aspects for regulatory review. Agencies are required to adopt cost-effective regulations, and there is a call for the use of risk assessment by the agencies. There is also a call to use performance standards rather than design standards when promulgating regulations. In addition, agencies will continue to look at alternative forms of regulation in order to de-

termine the most cost effective approach is taken. However, the expanded definition of costs and benefits, which includes non-quantitative measures, increases the potential for costly rules that are justified on the grounds of newly-defined benefits as diverse as distributional impact or equity. With fewer rules going to OIRA, this could have a significant impact on the regulatory burden.

Another important element in the structure of OIRA and the new executive order is the designation of the Vice President as the coordinator of regulatory policy and planning. Under Executive Order No. 12866 the Vice President, relying on a group of regulatory policy advisors within the Executive Office of the President, will be responsible for carrying out the directives of the executive order. In addition, the Vice President is responsible for settling interagency disputes over regulatory issues.

#### THE IMPORTANCE OF H.R. 9

The "Job Creation and Wage Enhancement Act of 1995" is an important plank of the Contract with America that contains a number of regulatory reforms to ease the regulatory burden on American consumers while ensuring the benefits of regulation exceed the costs. A strong reauthorization of the Paperwork Reduction Act, new standards for risk assessment based on sound science, a regulatory budget, and improved cost-benefit analysis are fundamental tools for regulatory reform. The Clinton Administration's *Unified Agenda of Federal Regulations*, issued November 14, 1994, identifies more than 4,300 rulemakings within federal agencies. H.R. 9 provides the administration with enhanced capabilities for ensuring cost-effective regulations that achieve their goal in the least cost manner.

Title VII of H.R., which focuses specifically on cost-benefit analysis, establishes a strong foundation for centralized review of federal regulations. H.R. 9 develops a basic set of tools for regulatory review that attempts to minimize unnecessary bureaucratic discretion in the rulemaking process while implementing objective assessments of the benefits and costs of regulation.

Mr. Chairman and Members of the Committee, Citizens for a Sound Economy supports efforts to strengthen the regulatory review process, in order to make needed regulations more effective and to eliminate regulatory excess. Title VII is important. We urge you to act favorably on this important legislation. Thank you.

Mr. GEKAS. Mr. Gray, you said that, putting everything in its most visible context, the President still has to get involved to get these agencies to respond. And yet we heard testimony, and it bothered me a little bit, that even under President Reagan's Executive order which both of you crafted, that some of the agencies just didn't respond in any event because either they felt that they were beyond the President or had a world of their own. A realm in their own jurisdiction. Do you recall instances like that, complaints that would come back to you, that indeed, even the President's directive was not being employed by the agencies to whom it was directed? Is that—

Mr. GRAY. Yes, sir. We had a great problem with the IRS.

Mr. GEKAS. Well, I am sorry I mentioned it.

Mr. MILLER. They accounted for more than half our paperwork.

Mr. GRAY. They wouldn't even come to meetings in the White House. They refused to show up.

I remember one, Agricultural Marketing Service. We wanted to get a handle on marketing orders which were government-imposed price-fixing, and Congress—a Democratic Congress I want to hasten to add—passed a law that prohibited OMB from looking at it. I mean, Mr. Miller was going to jail if he allowed this stuff to get into his office.

Mr. MILLER. I was afraid somebody might plant some study in my house.

Mr. GRAY. I want you to know that after 12 years, without the aid of OMB, the White House, was finally able to ditch the market-



ing orders in 1992. I am sorry we did, in a way, because you would have had a lot of fun using it as an example of overregulation.

Mr. MILLER. They went to the FTC. They prohibited a new study at the FTC.

Mr. GRAY. So there are a couple of examples, but those come to mind.

Mr. GEKAS. It might have been involved in marketing orders with America, along with the Contract With America.

Mr. MILLER. Mr. Chairman, could I just mention? It really worked well, I think, for the first few years.

But when the agencies began to feel their oats, and Congress would establish, say, for example, judicial timetables for issuance of regulations, agencies would hold up sending them over until the very last minute. And, of course, there would be no time to do any reforms at that point, as they were gaming the system. That is when it began to break down. That is when, for example, just as a surrogate measure, the number of pages in the Federal Register began to travel back up.

Let me amend something I said before. I don't want to give you the impression that there is no need for regulation. There is an important need for regulation. And there are some additional regulations that are needed.

I mean, if you look at some of the OMB's work about the relative risk of different kinds of carcinogens, et cetera, the tragedy is that the agencies are out there causing enormous costs for minuscule benefit in many areas and passing up opportunities to make substantial savings benefits to us all in other areas. The kind of legislation that you have in mind will force them to address those things that are most important.

Mr. GEKAS. Your joint response to my question about the Reagan Executive order and how it had a mixed review brings me to question Mr. Hawkins' question about his decrying our rush to judgment in H.R. 9, at least I got that impression from your testimony, without really assessing the impact, et cetera.

Well, the Executive order that was issued by the President and then President Bush and now by President Clinton—whatever configuration that takes—was not subject to any review by anybody. At least we are giving, are we not, the opportunity for the public to respond? For the people who are affected, people who are worried about the environment and everybody else to have input. That is what this hearing is all about.

And if we rush to judgment within the 100 days or shortly thereafter, what world is going to be overturned to such an extent that we can't revisit—like we are now revisiting the things that happened with the Executive order that didn't suit, if you follow what I am saying. We have got to act. We want to do something, don't you see?

Mr. HAWKINS. Those are good questions, Mr. Chairman.

Just a bit of a response. The Executive orders that have been mentioned, first, did not sweep down to the level that this legislation intends to go. It required analyses of rules that had a potential impact of \$100 million, rather than a potential impact of \$1 million or 100 people. A rule that affects 100 persons can be a rule that saves money. It can be a rule that imposes \$10,000 a year in costs.

EPA has analyzed the cost to the taxpayer of complying with the regulatory impact and risk assessment analyses required in H.R. 9 for major rules as costing \$1.6 million per analysis. Why is it rational to require the agency to spend \$1.6 million to analyze the impact of a rule that may save money? The problem is, when you write it into a statute, then you have to write a new statute to fix it. That is one of the reasons to ask the questions first before voting to enact this into law.

Mr. GEKAS. But what I hear is, my gosh, it is going to cost the agency and the Federal Government and the taxpayers, our pockets, the governmental pockets, \$1.6 million, and that is dreadful. I agree it is. But not having that cost-benefit analysis may cost our taxpayers in the formation of enterprise and in the production of jobs money that will prevent them from doing that. I have been an advocate of reducing costs to government but not at the expense of our citizens.

Mr. HAWKINS. Well, Mr. Chairman, I think you have at least three choices. One of them is to just go ahead and enact this law without understanding its consequences. A second is to enact a law that is not so sweeping and, therefore, does not pose the possibility of being counterproductive and basically bogging down the agencies and imposing the obligation to do studies and analyses of the different threshold levels and requiring some supplementation of review, if these analyses would warrant that.

The difficulty that we think the Government will face with this kind of a sweeping edict is that it will not solve the problem which the previous panel really gave eloquent testimony to.

It is easy to demonize people. And, you know, the environmental movement has been guilty of demonizing polluters, and polluters have been guilty of demonizing the environmental movement. But, by and large, you know, the regulators are not evil people. They are human beings like you and me. And they try to get through their day figuring out how to reconcile conflicting commands that they feel that they are answerable to.

Congress enacts statutes which require them to take certain actions, require them to try to take those actions in a time frame. Congress provides them with certain resources to do it. They are beset by interest groups from all sides, and they try to figure out how they are going to carry out their job.

One of the things in my view—and I was a regulator in the Carter administration—my personal perception about this is that a great many of these apparently hard-to-live-with regulatory decisions are a product not of stupidity or nastiness on the part of a regulator but it is due in part to the regulator trying to find a way to conserve administrative resources by making things simple, by trying to minimize complicated decision rules for the agency.

Now, sometimes that may result in a rule that looks arbitrary or rigid. I would submit by further stressing the agency resources you will increase the pressures on them to find ways to conserve administrative resources, and it may lead to more of these difficult rules, not fewer.

Mr. GEKAS. I yield myself another 2 minutes simply to say to you that it may be better for us—and I for one am willing to take that chance—for us to gamble whatever that term would require for

Members of Congress to gamble on the effectiveness of H.R. 9 to try to reverse the big trend that has amalgamated itself over the last 20 years and then see what the consequences are and revisit if we have to. But the time has come to gamble slightly it is not a total gamble—on the effectiveness of H.R. 9.

One other thing I want to tell you is that I agree with you and I am willing to try to convince my colleagues that we ought to perhaps change the wording of where we give the OMB Director this silent veto power. It may be salutary. And this will be directly attributable to your testimony if we do it, and I want to try to do it.

Where it says now, "an agency may not adopt a major rule unless the final regulatory impact analysis of the rule is approved in writing by the Director of the OMB." That means that the OMB Director's silence is a veto; is it not? I would want to change it around to the affirmative and perhaps require the OMB on every submission to make a decision in writing.

Mr. HAWKINS. Well, I think that would be a great benefit, and we would be happy to work with your staff on any language that you may be considering in that regard.

Mr. GEKAS. I only have one vote on the committee, though.

Yes, Mr. Miller.

Mr. MILLER. Could I just follow up and say I agree with Mr. Hawkins? We shouldn't demonize regulators. They are people, the so-called bureaucrats that take these regulatory actions. They are not mean people. They are people that have families and children, and so forth. They are not bad people. It is just that they are pursuing objectives that just don't make sense so many times.

And what this legislation does is say, you must follow some commonsense rules. Common sense. My friend Phil Gramm uses the Dickey Flatt test: How would Dickey Flatt respond to this?

I used to say, go ask somebody who comes out to help you at a service station. If you try to explain to that person what you are doing and you can't do it without one of you laughing, then you are doing something wrong.

We recognize that many of these regulations make no sense. And this legislation would keep them from instituting such regulations and, in fact, provide them with a good rationale for not doing things that make no sense.

Mr. GEKAS. All right. I yield to the gentleman from Rhode Island.

Mr. REED. Thank you, Mr. Chairman.

I want to thank the witnesses for their fine testimony.

Mr. Gray, you touched on a point, on the need for Presidential flexibility to be the Chief Executive of the country and to the extent that that might be in some place inhibited by judicial review. Could you elaborate? Because that is an issue we will have to struggle with.

Mr. GRAY. The point I was trying to make is that whatever judicial review is provided should not permit outside parties to challenge the President for his failure to give enough time to reviewing personally or through his White House subordinates. It is the procedural steps involving how things that happen in the White House that I was saying should not be subject to review. What should be subject to review are the factual findings of the agency.



I want to make the point here that, at the end of the day, whatever happens from the President or from the Director of OMB or the Office of Information and Regulatory Affairs, whatever happens has got to be reflected in the record. That is, the rule that is ultimately issued must be justified by the rulemaking record. It must withstand at least arbitrary and capricious review in the courts. So there is always that protection.

What is not now available for review and should be, however, is the decision or determination that the benefits justify and exceed the costs. But the procedural parts of any of these bills should not be open to review.

Mr. REED. Let me be clear. In your opinion, at this point in the drafting of the legislation, such procedural challenges would be available?

Mr. GRAY. You will hear testimony after me from the Administrative Conference, from Ernie Gellhorn and others, that it is unclear. Because, normally, judicial review is available. But the order itself says that nothing in the order is judicially reviewable, so it is not clear as to how it all works out.

I think it is fairly simple to fix it. I don't have any blueprint here, but it is fairly simple to fix it. I just believe that it ought to get clarified.

Mr. REED. Let me raise another question to both Mr. Miller and Mr. Gray. You both discharged substantial responsibilities in the executive departments and with not unlimited resources, and yet this legislation would seek to review every rule with a potential impact of \$1 million or affecting 100 people. When you chose to pick a standard, it was \$100 million.

There are only so many hours in the day and so many people in the Federal Government, and I think you all would like to see less people in the Federal Government and more hours in a day. But the point is, isn't the standard that you adopted of \$100 million much more reasonable than—

Mr. GRAY. Yes. My testimony says that I think this title VII covers too many rules. There is probably a different threshold that ought to be used, but it should have a safety valve which I believe our Executive order did, that the President should be able to reach down and say, I am going to call that rule a major rule. Even if, technically, some analyst in the bowels of EPA says it only effects \$99 million, I want to call that a major rule. The President should have that flexibility to invoke the panoply of these safeguards when he chooses to do so.

And, believe me, that is not going to happen all the time. If you knew how hard it is to get a President's attention on issues of this kind, that is why this legislation is so very important, to invest the White House in these issues.

One of the problems that we had in the Bush administration is that we lost the Senate in 1986; and so we had a Democrat House, a Democrat Senate. And although the facts involved here are somewhat complicated, at the end of the day, the Senate refused to confirm an OIRA director. So we never had someone like Sally Katzen who appeared before you earlier. We never had such a person confirmed by the Senate to run that Office. And that was one of the

disabling things. Hopefully, this will not happen with Republican control of the Senate.

Mr. REED. Mr. Miller, would you like to comment?

Mr. MILLER. Well, I am flexible on the threshold issue too, and I think it is important that OMB have the right to reach down and identify something which technically might not qualify as a regulation.

It is not just a question of the rules. An agency can issue different kinds of policy statements. Keep in mind agencies will try to game this thing. So we need to have somebody say, "For purposes of this act, that provision is a rule." I think that ought to be included in your legislation.

On the other hand, if agencies realize that they have limited resources, presumably they will make more careful decisions about which regulations to promulgate. They would promulgate those that were the most important, knowing that there would be a requirement for some analysis as a result.

Mr. REED. Thank you.

Mr. Hawkins, you brought up a point which I think is worthy of further consideration. You pointed out that in the further titles of this legislation there is a call for a 20-percent reduction in the information requested by Federal agencies. Yet particularly if we adopt the regime where a major rule is defined as 100 people affected or \$1 million, we would potentially have an exponential increase in the need for information. And that seems to me to be somewhat irreconcilable. Would you elaborate further?

Mr. HAWKINS. Well, yes. We think it is irreconcilable. The only way it could be reconciled would be by the agency devoting almost all of its resources to analysis, which will have the effect possibly of producing some rules that are improved. But I think the most pronounced effect will be that the taxpayers' dollars will be spent on analysis rather than the reasons the agencies were established in the first place, which is to act to protect the public in circumstances where that protection is appropriate. It will mean that 9 out of 10 taxpayer dollars that are going into the EPA will be spent on analyzing what the Agency should do or whether it should do anything, and 1 out of 10 may be spent actually on putting in place these protections. It will basically funnel everything through this analytical bottleneck.

Mr. MILLER. May I just say, I can't conceive of \$9 out of \$10 going to analysis in any of these agencies.

But, secondly, let me say isn't it appropriate that we spend a little bit of time and attention on analysis, given that conservative estimates of the cost of regulation are upwards of \$500 billion per year? That \$500 billion is roughly a third of the total Federal spending budget that just came out today. It is roughly a third.

And so, to do some analysis I think—

Mr. REED. I don't think anyone would dispute you, Mr. Miller. We should be doing more analysis.

But the question is, if you are statutorily limited and in fact must reduce your request for information, which is the basis for analysis, and yet on the other hand required to do a much more extensive analysis on every potential regulation, it seems to me there is a disconnect, as one of our previous witnesses testified.

Mr. MILLER. Well, Congressman, if you have gone through, as I have, some of these information requests—in the case of OIRA I had to do this because we were given the responsibility by Congress to reduce the paperwork costs to the American people. If you go through some of this, you will find that these agencies demanded truly excessive information. And you must have yourself heard from constituents who ask the question, "Why in the world is this agency demanding I fill out all of these forms and provide all of this information?"

Mr. REED. I agree, Mr. Miller. But I don't think we can escape the conclusion that, if this legislation passes, an agency in good faith following this law has to ask a lot of questions that they don't ask now in terms of costs, benefits—the example of the bacteria up in Milwaukee where we would have to conduct extensive scientific research to find out the benefits and the costs, et cetera. All of that is triggered not by the need to get the regulation out, but by this particular legislation.

Mr. HAWKINS. If I could just add a thought, Congressman.

It seems to me that Mr. Miller is really not addressing the point I raised. The issue is not some analysis. There has been some analysis. Indeed, there has been a great deal of analysis ever since the Ford administration in regularized procedure of major rules.

The question is, how much analysis? And to state it in the terms of this legislation, is the analysis that is being required going to be cost-effective analysis or are you going to go beyond the point of diminishing returns?

What we are saying is that if you require analysis down to the hundred person level, you are going well beyond the point of diminishing returns in two regards. You will be spending scarce resources analyzing rules that don't warrant that amount of resources. Second, the very fact that you are spending all of those resources analyzing that huge volume of rules will bog down the system, and that will cause the agencies to be less responsive, not more responsive.

Mr. REED. Thank you. Mr. Chairman, thank you.

Mr. GEKAS. Do any other Members seek recognition?

The gentleman from Ohio.

Mr. CHABOT. Yes. Just a brief question for Mr. Gray.

Is it your opinion that, without judicial review, an impact analysis mandate could be undermined by lack of will to enforce it due to a particular philosophy of the administration who might be in office at that time?

Mr. GRAY. I think that is an accurate statement. And whether you put the judicial review in here or do it in title III, I am not—I am not sure I have a view. The two must be integrated, as I said. But I do believe there must be some review available by the facts that are marshaled by the agency.

Mr. CHABOT. Thank you. I yield back the balance of my time.

Mr. GEKAS. Does the gentleman from Georgia seek recognition?

Mr. BARR. Thank you, Mr. Chairman.

Mr. GEKAS. Recognized for 5 minutes.

Mr. BARR. I think it is apparent in some of the comments both of this panel and not the previous panel but Ms. Katzen that this administration and its proponents really favor a go-slow approach.



And I, for one, think that that has gotten us to the point where we are.

I don't think we need to be going slow. I think we need to be bold and take some steps here that start the process sweeping aside—sweeping aside a series or a mentality that has grown up here that regulations are good and that the burden is on the people who are the targets of those regulatory measures to prove themselves or to prove their innocence or whatnot. I am hopeful that this panel and the full Judiciary Committee and the Congress will not take a go-slow approach on this.

Mr. Miller, you indicated in your testimony that President Clinton's Executive Order 12866, which altered the OMB review process may, in fact, weaken effective regulatory oversight as carried out under the previous Reagan Executive order. Could you be somewhat more specific on that point, please?

Mr. MILLER. Well, the Reagan Executive order says, agencies have to show A, B, C, or D; and it has to do with showing the impact of the regulation really will be beneficial. The rhetoric contained in the new Executive order is similar, except that it says, essentially, it must also be fair.

And maybe it is because I am trained as an economist, but I recognize that fairness to one person is unfairness to another. In other words, the fairness part, the distributed effects, et cetera, of the regulation as talked about in President Clinton's Executive order seem to me to provide a loophole. And, surely, if these kinds of requirements were subject to judicial review, I don't know where the courts would come down, how they would rule. I mean, what is fair to one is unfair to the other.

Boyd and I both are involved with the Administrative Conference, and we spend a lot of time thinking over these issues. And I think many very smart people have come to some pretty good decisions about recommending changes to assure access, fairness, and the like.

But altogether, this seems to me an area where reasonable people can disagree. It is an area where a philosophy of one sort can yield much more regulation than a philosophy of another sort.

It seems to me that if you apply the commonsense rules that are contained in Executive Order 12291 and limit it to that I would have judicial review first, the question of whether the agency did an analysis; and, secondly, an arbitrary and capricious standard for the analysis itself.

I wouldn't want every Federal judge trying to put themselves in the position of doing their own analyses. So I wouldn't suggest that kind of judicial review.

But I think review of the analysis makes some sense if it seeks to limit the requirements for accomplishing straightforward things rather than some sort of amorphous ideal such as fairness. This is not to say that we don't want to be fair. That is not it at all. But you don't want to give these regulations a loophole.

Mr. BARR. That really addressed one of my other questions. I appreciate your addressing that.

Mr. Gray, on page 3 of your testimony and also in response to one of the other questions, you indicated that you would be willing to provide some additional guidance to this subcommittee with re-

gard to the potentially overbroad provisions of title VII of H.R. 9, and I would just like to tell you that I very much personally would appreciate receiving your thoughts on that if possible. I think it would be very helpful in helping again to fashion this particular title as strongly as possible and in anticipation of, obviously, what are going to be court challenges. I would be very receptive to receiving such information.

Mr. GRAY. I will be glad to provide it.

Mr. BARR. Thank you.

Mr. Chairman, I yield back the balance of my time.

Mr. GEKAS. I thank the gentleman, and I thank the panel. We have learned a great deal. Keep watching us, will you?

Mr. MILLER. Yes, sir.

Mr. GEKAS. The final panel, the members of which we now invite to the witness table, include Ms. Thomasina Rogers, the Chair of ACUS; and Mr. Gellhorn, who is deeply involved in the questions of administrative law; Gary Bass, the executive director of an organization known as OMB Watch, a nonprofit advocacy organization; and George Freeman, an attorney with the law firm of Hutton & Williams in Richmond, VA, who is currently serving as cochairman of the American Bar Association's Working Group on Regulatory Reform.

We welcome all of you, and we would ask you to proceed in the order in which you were introduced. That means Ms. Rogers is first.

#### STATEMENT OF THOMASINA V. ROGERS, CHAIR, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Ms. ROGERS. Good afternoon, Mr. Chairman and members of the subcommittee. Thank you for inviting me to testify today on title VII of H.R. 9. I am testifying on behalf of the Administrative Conference but not on behalf of the administration.

With me is Mr. Ernest Gellhorn, who is a lawyer in private practice here in Washington, DC, and also a faculty member of the George Mason University Law School. Most importantly, though, he is the Chairman of the Administrative Conference's Committee on Rulemaking and has been so for the last 9 years. And I apologize at the outset that Mr. Gellhorn is going to have to leave shortly to take care of his obligations.

Mr. GEKAS. Do you want to yield to him first to give his testimony?

Ms. ROGERS. Mr. Gellhorn is not going to give testimony, but he is here to answer questions. So I am going to submit my testimony for the record.

Mr. GEKAS. Without objection, we will accept your statement for the record.

Ms. ROGERS. I will be very brief in my remarks.

I would like to just take a few moments, though, to explain what the Administrative Conference is, to give some context to the remarks that I will make and that Mr. Gellhorn will make in the context of answering questions.

The Administrative Conference is an independent, nonpartisan agency dedicated to improving the administrative processes by which the Federal Government carries out the public business. It

is a private-public partnership. We develop formal recommendations on questions of administrative procedure through a public consensus-based process involving our members from the Government and from academia and from the private sector.

We have no partisan agenda. Our members from the private sector represent all of the points on the political spectrum. In fact, all of the members of the panel immediately preceding me were members of the Administrative Conference, as is Sally Katzen.

The Conference takes no positions on substantive policy issues. Our focus is solely on procedures and processes used to implement agency programs and policies and how they affect efficiency, effectiveness and fairness of those programs.

The Conference has not formally taken a position on title VII. I have appended to my testimony technical comments, though, that do address some of the issues in the bill. And to the extent that my comments go beyond recommendations that have been adopted through the Administrative Conference process, I am speaking only for the office of Chairman.

I would like to emphasize that there are major themes in title VII with which the Conference is in agreement, as can be determined by the recommendations that have been approved. There are areas where the Administrative Conference historically has supported other approaches that are different from title VII. And then there are a couple of areas that I would like to mention as recommendations to improve the bill.

Just very, very briefly, the areas in which we are in agreement, based on the recommendations that have been adopted by the Administrative Conference, include the concept and the importance of regulatory analysis as a tool for improving the rulemaking. We subscribe to it. We have endorsed it as a Conference.

Also, we promote the opportunity for public participation in the rulemaking process.

We have consistently encouraged agencies to offer opportunities for the public to comment beyond that which is required by the Administrative Procedure Act. And we have also recommended a procedure called negotiated rulemaking, which offers those affected by a rule the opportunity to participate directly in the development of the proposed rule.

One of the witnesses on a prior panel had suggested, if you will, a partnership between the regulator and the affected parties. We believe that negotiated rulemaking offers the opportunity for such a partnership.

The Conference finally has also endorsed very strongly the concept of Presidential oversight of the rulemaking process as a mechanism for encouraging consistency and avoiding duplication.

There are some concerns that I would just like to highlight very quickly. We are concerned at the Administrative Conference about broadly applicable statutory analysis requirements that are often not effective in achieving their goals. In other words, the more requirements by statute that are imposed upon the administrative agencies, the less attention agencies will give them, particularly with reduced resources. And so we question how effective these requirements will be.



Nevertheless, we do share the concern, as expressed in the bill, that there be greater accountability by governmental agencies. And we would like to work with the committee to see how best to achieve that objective without sacrificing efficiencies in the process.

In addition, as far as public participation is concerned, we, at the Conference, believe, as I indicated earlier, that public comment on regulations is a goal that the Conference shares with the proponents of title VII. However, when statutory requirements such as requiring public hearings or an additional tier of notice and comment are mandated for nearly every rule in an one-size-fits-all style, agencies have less flexibility to address particular situations and greater opportunities are offered for technical, procedural, legal challenges to the rule.

I have included an appendix—appendix A—to my prepared testimony. That appendix provides some technical suggestions on issues that are raised by title VII.

On the question of Presidential oversight, the Conference again strongly supports Presidential coordination of agency policymaking as beneficial and necessary, but we are concerned about the effects of making the requirement statutory. For example, we looked at the Reagan Executive order itself as having been modified informally several times over the years and we are concerned about incorporating an Executive order into a statute wholesale and thereby potentially creating unintended ambiguities.

Consistent with title VII's focus on openness and accountability, the Conference has recommended an additional step, which is the openness or transparency in the Presidential review process. More openness, I should add, than was provided in the Executive Order 12291. We suggest that the committee consider incorporating broader disclosure provisions that would offer the public the opportunity to see how rules assume their final shape.

As far as judicial review is concerned, a number of panelists have noted concerns with the judicial review implications of title VII. In these times of limited judicial resources, it is worth considering the extent to which it is wise to create a substantial new list of grounds for court challenge. It is also important that the legislation make clear its intention about the extent to which it has created newly judicially enforceable rights. We think at this point it is not clear, although there is a presumption of review ability as a matter of course.

While the Conference endorses many of the separate provisions of title VII, we suggest that the committee consider carefully the aggregate impact of its many requirements. As I indicated, our observation over the years shows that as constraints on rulemaking processes have increased over the decades, agencies concerned about accomplishing their missions have increasingly implemented their programs through what are called "nonrule" rules, such as informal policy guidance and enforcement manual provisions, as a way to avoid resource investment and pitfalls and the delays in the rulemaking process.

As far as the two suggestions that I would make in addition to the technical observations that I have appended, I would like to make two suggestions to the bill. The Conference has long endorsed the elimination of the exemption from notice and comment require-

ments for rules related to public property, loans, grants, benefits or contracts. Many of these categories of rules do have an impact on the public, and in the interest of increasing the agency accountability, the public should be able to comment on those, and right now they are exempted from notice and comment.

Secondly, the Conference has also advocated the use of negotiated rulemaking as a mechanism for providing direct input by the affected public into the development of proposed rules. We believe that this process offers the public and agencies in appropriate cases the chance to come together to share information and negotiate a rule across the table that the agency, the regulated community, and other affected interests can live with. So we suggest that the committee consider amending section 7004 to provide that where an agency uses negotiated rulemaking to develop a proposed rule, the regulatory analysis requirement not be applicable to that rule-making.

In finishing, the Administrative Conference applauds many of the themes of title VII, including the benefits of regulatory impact analysis, public participation, and Presidential oversight, but offers the perspective and suggestions on implications of some of the bill's provisions as reflected in the appendix.

My staff and I would be happy to work with you and to offer more specific technical suggestions aimed at preventing some of the consequences that have been discussed in prior panels.

Mr. Gellhorn and I will be happy to answer questions at this point.

Mr. GEKAS. All right. Well, I am not going to bifurcate the question and answer period, so I will have to ask each panelist to make their opening statements before we get to any questions.

[The prepared statement of Ms. Rogers follows:]

PREPARED STATEMENT OF THOMASINA V. ROGERS, CHAIR, ADMINISTRATIVE  
CONFERENCE OF THE UNITED STATES

INTRODUCTION

Thank you for inviting me to testify today on Title VII of H.R. 9, the Administrative Procedure Reform Act of 1995. I am testifying on behalf of the Administrative Conference of the United States (ACUS). With me is Mr. Ernest Gellhorn, who is both a lawyer in private practice and a member of the faculty at the George Mason University Law School. He has been Chairman of the Conference's Committee on Rulemaking for almost nine years.

The Administrative Conference is an independent nonpartisan agency dedicated to improving the administrative processes by which the federal government carries out the public's business. We are the only federal agency whose exclusive charge is to make federal regulatory (and other) programs more effective, fair and efficient. With the help of a small professional staff, and the assistance of contract consultants, most of whom are law professors, the volunteer members of the Administrative Conference from outside government come together with representatives of the principal departments and agencies to take a hard look at government processes, procedures, and organizations—to see what works, what doesn't, and how things can be made more fair, more streamlined, and more effective. Our primary task is to make practical proposals for improving the way government interacts with the citizens it serves or regulates.

The Conference's formal recommendations are developed through a process that involves careful consideration of an issue by one of our standing committees. (Rule-making issues are considered by our Committee on Rulemaking.) Committee meetings are public, and involve discussion and debate among the government and public members, as well as others who are interested. Proposed recommendations are forwarded from the Committee to the full membership of the Administrative Conference, which meets twice a year in Plenary Session to debate and vote on the pro-

posals. Only those recommendations that are adopted through this process become formal Conference positions.

We have no partisan agenda. Our members from the private sector include individuals from both political parties, plus independents, who represent all points on the philosophical spectrum. They all bring knowledge and perspective on the administrative process. Our recommendations are politically agnostic and reflect the consensus of our members.

The Conference takes no positions on issues of substantive policy; by law, we may not delve into the scope of responsibility given an agency by Congress or evaluate matters of substantive policy committed to an agency's discretion. See 5 U.S.C. 592(3). Our focus is solely on the procedures or processes used to implement agency programs and policies, and implications for the efficiency and fairness of those procedures and processes.

The Conference has not formally examined Title 7 of H.R. 9. It has, nevertheless, addressed numerous aspects of the rulemaking process in its Recommendations over the years, and in so doing, has considered many of the issues the bill raises. To the extent that my comments go beyond the scope of those Recommendations, however, they reflect only the views of the Office of the Chairman.

I will first underscore what I see as the major themes of Title VII, with which the Conference is in agreement. I will then discuss some areas where the Conference has historically supported approaches that are different from those in Title VII. I will also mention some subjects which we believe would enhance the bill.

#### AREAS OF AGREEMENT

I want to start by saying that there are substantial areas of agreement between the goals and objectives of Title VII and the Conference's recommendations over the years for improving the rulemaking process.

For example, the Administrative Conference supports the concept of regulatory analysis as a tool for improving the rulemaking process. In a Recommendation entitled "Agency Procedures for Performing Regulatory Analysis of Rules," dating back to 1985, which I have appended to this prepared statement, ACUS pointed out that regulatory analysis can be a useful device in rulemaking if it is taken seriously by upper level decisionmakers, the function is effectively integrated into the rule-making process, and its limitations are recognized by those relying on it. The Conference's Recommendation 85-2 specifically noted that cost-benefit analysis is "an effective tool for marshaling and analyzing information and for establishing regulatory priorities." It also underscored that the information in regulatory analyses should be available to the public.

The Conference has also continuously promoted increased opportunity for public participation in the rulemaking process. Public comment provides valuable input into the decisionmaking process, improving the level and quality of information on which the agency bases its action. Public participation also enhances the agency's accountability and ultimately, the acceptability of the rule. ACUS has consistently encouraged agencies to offer opportunities for public comment well beyond those required by the Administrative Procedure Act (APA). We have suggested that the APA's coverage be expanded to include certain types of rules currently exempt (such as those relating to agency benefit, grant and contracting activities). We also developed the concept of negotiated rulemaking, which offers those affected by a rule an opportunity to participate directly in the development of a proposed rule. So, Mr. Chairman, we are—and have long been—staunchly devoted to enhancing the public's ability to influence agency decisions and making agencies accountable for taking the public's views into account.

The Conference has also strongly endorsed the concept of presidential oversight of the rulemaking process. It views this as important to encourage consistency and avoid duplication in regulatory activity. It has supported what is known in some circles as "increased transparency" of the presidential review process, that is, making it open and visible to the public, so that the regulated community and the public can see exactly how decisions were made. It has also recommended, as in Title VII, that independent agencies be included in the presidential review process.

#### APUS' PERSPECTIVE

As I noted earlier, it is not ACUS's role to address substantive policy issues or any underlying policy choices that may be reflected in Title VII of H.R. 9. Given those constraints, we believe that we can be most helpful to the Committee by focusing on the implications of this title for the rulemaking process.

The Conference recognizes that rulemaking is undertaken by agencies exercising Congressionally-delegated authority, to implement Congressional commands. In



many cases, the result is to add or change requirements. These may be rules that add substantial burdens. They may provide needed certainty in the marketplace, uniformity to avoid conflicting state standards, or safety protections to our citizens. In some cases, rulemaking is aimed at reducing or eliminating existing requirements. Some rules are aimed at addressing emergencies or problems that require quick solutions.

As this Committee knows, the Conference, a year ago, under Ernie Gellhorn's able stewardship, completed a major examination of the rulemaking process and made a number of proposals. I attach a copy of that Recommendation, No. 93-4, entitled "Improving the Environment for Agency Rulemaking." The Conference's perspective, as reflected in that and other recommendations, is that, irrespective of the issues the rule is intended to address, the rulemaking process itself should not waste scarce resources. It should not create unintended consequences, such as increased litigation arising over uncertainties in the applicable procedures, if it is possible to avoid them. It should generally provide at least some flexibility, so that agencies are able to deal with the unexpected or emergencies. And it should not unnecessarily burden the citizens it is intending to regulate. In short, when Congress decides that an area of national life should be subject to more or less federal regulation, and that an agency should invoke its rulemaking authority to address the problems Congress wants corrected, it should do so efficiently, effectively, and fairly.

Some of the concerns we raise below are based on the potential effects of the broad scope of the definition of "major rule," which would appear to subject nearly every rule to Title VII's new requirements. If the scope of "major rules" were more limited, some of our concerns about the bill's effects would correspondingly be lessened.

#### REGULATORY IMPACT ANALYSIS

As I mentioned, the Conference supports the concept of regulatory impact analysis. The Committee should be aware, however, of the potential for unintended consequences of enacting an extensive list into statute. In Recommendation 93-4, the Conference suggested that broadly-applicable statutory analysis requirements are often not effective in achieving their goals. The more distinct requirements that Congress imposes, the less attention agencies with reduced resources can realistically devote to meaningful analysis of each one. The addition of new elements to a statutorily-required list may become primarily paperwork exercises or may lead agencies simply to add a new box to be checked off in each new rulemaking proposal. Therefore, ACUS has urged Congress to consider carefully whether statutorily-imposed regulatory analysis requirements are necessary. Where Congress determines that they are, the Conference has suggested that regulatory analysis requirements be focused narrowly on those areas where they are likely to be the most useful. Moreover, to the extent that any "new" requirements are intended merely to codify similar pre-existing ones, needless litigation may be engendered unless Congress makes clear that the new provision does not effect a change in existing law. So, if the Committee decides to go forward with a statutory list of topics to be analyzed, the list should be reviewed carefully, to see whether specific items can be pruned or eliminated, or if separate analyses can be combined.

#### PUBLIC PARTICIPATION PROCEDURES

Increasing the opportunity for public comment on regulations is a goal that the Conference shares with the proponents of Title VII. However, when statutory requirements, such as requiring public hearings or an additional tier of notice and comment are mandated for nearly every rule (as would be the case under Title VII's definition of "major rule"), agencies have less flexibility to address particular situations, and greater opportunities are offered for technical, procedural legal challenges to a rule. In Appendix A, we note some technical issues raised by Title VII.

#### PRESIDENTIAL OVERSIGHT

Title VII writes into statute the provisions of Executive Order 12,291, which governed presidential review of executive branch agency rulemaking from 1981-1993. The Conference strongly supports "presidential coordination of agency policymaking as beneficial and necessary." We are, however, concerned about the effects of making the requirements statutory, which complicates efforts to adapt such provisions to meet changing circumstances. For example, the Reagan Executive Order itself was modified informally over the years and also concerned about incorporating an executive order into a statute wholesale and thereby potentially creating unintentional ambiguities. We suggest instead codifying, if any, only those portions of it that are considered most critical.

Consistent with Title VII's focus on openness and accountability, the Conference has recommended greater openness in the presidential review process than is provided for in E.O. 12,291, which is silent on this point. The currently operative executive order on regulatory planning and review, Executive Order 12,866, provides substantial transparency of the process, allowing public understanding of how its government makes decisions. The Committee should consider incorporating these broader disclosure provisions.

#### JUDICIAL REVIEW

The Conference is also concerned about the judicial review implications of Title VII's provisions. In these times of limited judicial resources, it is worth considering the extent to which it is wise to create a substantial new list of grounds for court challenge (including perhaps whether proper grammar has been used). The availability of judicial review intended by the bill is not clear, but general principles of administrative law presume judicial review ability unless expressly precluded. Although the bill itself is silent on the point, E.O. 12,291, which would be incorporated into statute by the bill, specifically stated that it was intended for management purposes, and did not create new, judicially enforceable rights.

The APA has governed agency operation for almost 50 years, and most of its provisions have been the subject of judicial interpretation. Each new requirement will not only encourage lawsuits to determine its precise meaning, but will raise questions about how it is intended to relate to existing requirements and interpretations. The maximum amount of clarity about Congress' intentions will reduce some of the litigation.

#### OTHER UNINTENDED CONSEQUENCES

While the Conference endorses many of the separate provisions in Title VII, we suggest that the Committee consider carefully the aggregate impacts of its many requirements. Our observations over the years show that as constraints on the rule-making process have increased over the decades, agencies, understandably concerned about accomplishing their missions, have increasingly sought to implement their programs through "nonrule" rules, such as "informal" policy guidance and enforcement manual provisions, as a way to avoid the resource investment, pitfalls, and delay of the rulemaking process. While informal "policy statements that inform agency staff and the public about agency policy are beneficial to both," (Recommendation 92-2, "Agency Policy Statements"), the movement toward "underground" rulemaking has the unfortunate consequence of eliminating both public input and any opportunity for challenge. Thus, an effort to improve a process may have unintended consequences, or, put another way, the best may become the enemy of the good.

#### PROPOSED ADDITIONS TO TITLE VII

There are several categories of rules that the Administrative Procedure Act now exempts from public notice-and-comment requirements. The Conference has long endorsed the elimination of these exemptions for rules relating to public property, loans, grants, benefits or contracts. See Recommendations 69-8, 93, attached hereto. Many of these categories of rules have an impact on the public, and, in the interest of increasing agency accountability, the public should be able to comment on these impacts (In fact, many agencies have waived the exemption.) The Conference suggests that Title VII be amended to eliminate this anomaly.

The Conference has also advocated the use of negotiated rulemaking as a mechanism for providing direct input by the affected public into development of a proposed rule. This process, which Congress endorsed in the 1990 Negotiated Rulemaking Act, offers the public and agencies, in appropriate cases, the chance to come together to share information and negotiate a rule across the table that the agency, the regulated community, and other affected interests can all live with. The process, although not suitable in all situations, has been used increasingly in the last few years, and experience suggests that it has produced rules that have engendered much less litigation than conventional rulemaking processes. We suggest that the Committee consider amending Section 7004 to provide that where an agency uses negotiated rulemaking to develop a proposed rule, the RIA requirement is not applicable to that rulemaking. The rationale for this suggestion is that negotiated rulemaking requires a large up-front dedication of resources; many of the kinds of information that Title VII would mandate for the regulatory impact analysis are exchanged in the course of the negotiating process. So, requiring preparation of an

RIA on top of the negotiated process is probably not necessary and would discourage agencies from using what is generally seen as a successful and useful tool.

### CONCLUSION

In sum, Mr. Chairman, the Administrative Conference applauds many of the basic themes of Title VII, including the benefits of regulatory impact analysis, public participation and presidential oversight, but offers its perspectives and suggestions on the implications of some of the bill's provisions.

My staff and I would be happy to work with you, and to offer more specific technical suggestions aimed at preventing unintended complications. Mr. Gellhorn and I would be happy to answer questions.

### APPENDIX A

#### TITLE VII of H.R. 9: Technical Comments on Certain Sections —Annotation

##### Sec. 7002 — Rule Making Notices for Major Rules

*[p.95, In 14-20 (new 553(f)(1)(A))] Amending §553 of Title 5 to add requirement that the head of an agency publish a notice of intent to engage in rulemaking 90 days in advance of a proposed major rule.*

Comment: This is the equivalent of what has been referred to as an "advance notice of proposed rulemaking" (ANPRM). ACUS has formally recommended that agencies use ANPRM in appropriate circumstances. See Recommendation No 76-3, "Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking." ACUS suggested that ANPRMs be used when (1) issues raised by the rulemaking are unusually complex, or (2) when it is in the public interest. It suggests that the ANPRM give a general description of the issues and invite public comment on the issues.

The provision in Title VII does not appear to solicit comments in response to the ANPRM. If an opportunity for comment is contemplated, the bill should address whether the agency would be required to respond to each comment, or instead, use the information in selecting the best regulatory approach, subject to further comment on the Notice of Proposed Rulemaking.

*[p. 96, line 1-13, (new 553(f)(2))] Requiring a final Regulatory Impact Analysis (RIA) for the rule to be prepared when the rule itself is only in a proposed form.*

Comment: The language in section (f)(2)(A) should be changed to refer to a *draft* or *preliminary* RIA, rather than a *final* RIA, so that the public has the opportunity to comment on a draft, and the agency can change its RIA to respond to such comment. (In fact, the bill does refer to preliminary RIAs in section 7004(c).) If the reference to final RIAs is retained (and if the RIA is subject to judicial review), the courts may be asked to entertain challenges to the "final" RIA before a rule has been promulgated.

Section (f)(2)(B) should also be changed to refer to a *preliminary* RIA.

Currently, agencies are required to publish a summary of the draft RIA with the NPRM, and let the public know how they can get a copy of the complete document.<sup>1</sup> Given the high cost of publishing in the Federal Register, and the fact that the RIA is likely going to be quite lengthy, this approach might be used.

An additional provision could be added to require a comparable summary of the *final* RIA as part of the preamble to the final rule.

<sup>1</sup> See E.O. 12,291 § 3(g), E.O. 12,866 §6(a)(3)(E).



### Section 7003 — Hearing Requirement for Proposed Rules; Extension of Comment Period

*[p. 96, ln 19-23 (amendment to 553(b))] Subjecting all rules (including those currently exempt from notice-and-comment requirements) to the requirement that an agency hold a hearing on any rule for which more than 100 public comments are received (new subsection (g), discussed more below).*

Comment: Some rules to which this public hearing requirement would be applied (interpretive rules, statements of policy, procedural rules, rules relating to agency internal structure, and rules subject to the "good cause" exception) are not currently subject to notice and comment at all, either because their impact on the public is not substantive, because agencies are encouraged to provide as much guidance to the public as possible, or because the public interest requires expedited action. The Committee should consider whether the public hearing requirement ought to be applied to such rules. Note also that there appears to be a technical inconsistency, since subsection (g) by its terms applies only to rules "proposed by the agency," which would seem not to include those issued without notice and comment.

*[p.96, ln 24 — p.97, ln 4 (new 553(g))] Adding a mandatory public hearing on any rule for which more than 100 comments are submitted.*

Comment: This provision does not make clear the scope and nature of such a hearing. ACUS has strongly opposed requiring trial-type hearings in rulemakings. See Recommendation 72-5, "Procedures for the Adoption of Rules of General Applicability." Presumably "public hearing" would not be a trial-type hearing. The Committee might also consider whether the public hearing requirement should be triggered by 100 requests for a hearing, rather than by 100 comments, since favorable comments would apparently be included by the current formulation.

*[p. 97, ln 5-20 (new 553(h))] Relating to extensions of the comment period.*

Comment: The first part of the new §553(h) would require an extension to the (currently unprovided for) comment period following a ANPRM. The second part would require the extension of the comment period to a NPRM. The Committee should consider including a waiver provision that agencies could invoke in situations where the public interest requires quicker action, particularly with respect to extensions of the ANPRM period. (Note our comment to section (f)(1)(A) that it does not currently specify whether the public may comment on the ANPRM.)

The extension to the NPRM comment period appears to assume a 30-day comment period. It is a common misconception that this is the statutory comment period. In fact, there is no minimum statutory comment period, but most agencies in practice offer 60-90 day (or longer) comment periods. The Administrative Conference has recommended that the statute specify a comment period of "no fewer than 30 days,

provided that a good cause provision allowing shorter comment periods or no comment period is incorporated . . . ." Recommendation 93-4, "Improving the Environment for Agency Rulemaking," ¶ IV(B). We note that a similar provision exists in the Clean Air Act, 42 U.S.C. 7607(h).

*[p.97, ln 21 – p.98, ln 4 (new 553(c)(2))] Requiring by statute that the agency publish responses to the comments the agency receives regarding a rule. It would apply to rules subject to notice and comment, and also to policy statements and interpretive rules.*

Comment: The courts now require agencies to address the significant issues raised in public comments in the preamble to the final rule. However, courts have consistently held that an agency need not respond individually to each comment, since often many commenters raise the same or similar issues. It is not clear whether this provision intends to change current law. The Conference has recommended that the "statement of basis and purpose" (the preamble to the rule) "respond to the significant issues raised in public comments." See Recommendation 93-4, ¶ IV(D).

The amendment would also extend the requirement to respond to comments to policy statements and interpretive rules, which are not now subject to notice-and-comment requirements.

#### Judicial review

The Committee should consider the extent to which it seeks to have the new provisions subject to judicial review of technical procedural challenges. In the absence of any statement by Congress, courts will presume judicial review is available.

Section 7004(a) would codify the provisions of Executive Order 12,291. Included in that executive order is a provision (in section 9) stating that the Order does not create judicially enforceable rights. The Committee should consider how that provision interacts with other parts of Title VII.

**RECOMMENDATION 85-2:**  
**AGENCY PROCEDURES FOR PERFORMING**  
**REGULATORY ANALYSIS OF RULES**

Since 1974 executive branch agencies have been subject to a series of Presidential executive orders that required agencies to prepare comprehensive impact analyses for major rulemaking proposals. Variouslly termed "inflation impact statements," "regulatory analyses," and "regulatory impact analyses," these analyses were all designed to identify or measure the costs and benefits of rulemaking options being considered by Federal administrative agencies. Congress also has imposed impact analysis requirements on administrative agencies through the National Environmental Policy Act of 1969, the Regulatory Flexibility Act of 1980, and by amendments to authorizing statutes for particular agencies.

The regulatory analysis function has become increasingly formalized within agencies as a result of the proliferation and durability of these requirements. This Recommendation is based on a Conference study of the ways agencies have incorporated the regulatory analysis function into their decisionmaking process. A general conclusion from this study is that regulatory analysis can be a useful device in rulemaking if it is taken seriously by upper level agency decisionmakers; the regulatory analysis function is effectively integrated into the rulemaking process, and the limitations of regulatory analysis are recognized by those who rely upon it.

The Recommendation contains specific advice on the use and limits of regulatory analysis and on integration of regulatory analysis into the agency rulemaking process. Unless expressly so stated, the Recommendation is not intended to address application of the Freedom of Information Act to agency records used in regulatory analysis. In particular, it is not intended to expand or decrease the statutory protections afforded trade secrets and commercial or financial information obtained for use in regulatory analysis.



## RECOMMENDATION

### 1. The Use of Regulatory Analysis to Identify Options

Regulatory analysis<sup>1</sup> can be most useful to agency decisionmakers in identifying regulatory options if the regulatory analysis function is an integral part of the agency decisionmaking process. To make regulatory analysis a more effective device for identifying options, agencies should adopt the following practices:

- a. When an agency begins intensive information-gathering and other analytical efforts on a rule, the agency's technical staff and regulatory analysts should attempt, at an early stage, to identify a broad range of regulatory options.

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1. The following definitions are used in this recommendation:

"Regulatory analysis" is a comprehensive analysis of the economic, social, and environmental impacts of one or more alternatives for addressing a problem undertaken in connection with an agency rulemaking effort. A regulatory analysis may include or be separate from an environmental impact assessment of a rule prepared in compliance with the National Environmental Policy Act of 1969.

A "regulatory analysis document" is a written regulatory analysis, whether drafted to comply with Executive Order 12,291, the Regulatory Flexibility Act, or other statutes and executive orders. Regulatory analysis documents also may include similar documents which, though not required by statute or executive order, are prepared to comply with agency regulations or directives stating that the agency intends to treat the documents as regulatory analyses. The term "regulatory analysis document" is intended to include only final analyses prepared in connection with a proposed or a final rule.

A "regulatory analyst" is an agency employee who prepares the whole or part of a regulatory analysis. Regulatory analysts often are economists or policy analysts by training, and they often are assigned to a separate institutional unit within an agency.

The "technical staff" is composed of agency employees within a program office who conduct investigations, prepare technical support documents, and often draft preambles and recommended language for proposed and final agency rules. When a member of the technical staff is assigned to perform a regulatory analysis, he or she then is both a regulatory analyst and a member of the technical staff.

b. Agencies should experiment with a phased system of reducing options. Under a phased system, the agency initially should identify as large a number of options as it can for brief study. As options are considered and rejected, the remaining options should be analyzed with increasing thoroughness. As resource constraints preclude further consideration of an option, the agency should list the option in its regulatory analysis document and explain briefly why the option did not warrant further study.

c. Although the extent to which options are identified and analyzed in regulatory analysis documents is largely a matter for individual agency management, regulatory analysis documents normally should attempt to identify and analyze several realistic regulatory options.

## 2. Integrating Regulatory Analysis into the Decisionmaking Process

a. Timing of Analytical Input. If regulatory analysis is to be used in a rulemaking, the agency decisionmaking process should be structured to involve agency regulatory analysts early in the evolution of the rule, before alternatives have been eliminated. Regulatory analysis should not be used to produce post hoc rationalizations for decisions already made, nor should it be allowed to unduly delay rulemaking proceedings.

b. Communicating Policy to Regulatory Analysts. Regulatory analysis can be a valuable tool for communicating policy within regulatory agencies because a primary function of regulatory analysis is to measure regulatory options against agency policy goals. Upper level policymakers in agencies should provide clear guidance to subordinate decisionmaking units (such as steering committees and working groups) on the policies that should guide the agency in choosing among options in individual rulemaking proceedings.

c. High Level Involvement at Important Decisionmaking Junctures. Because of the different perspectives of an agency's regulatory analysts and its technical staff, disagreements over appropriate agency policy will often result when both staffs are relied upon in the decisionmaking process. The agency should adopt procedures that will encourage resolution of such disagreements at important decisionmaking junctures at a high policy level.

d. Regulatory Analyst's Role in Responding to Comments. When an agency solicits public comment on a regulatory analysis document or on provisions of a proposed rule that are supported by the regulatory analysis document, the agency should structure its decisionmaking process to ensure that the agency's regulatory analysts participate in developing the agency's response to the public comments.

e. Intragovernmental Comments. Agencies should place in the public file of the rulemaking proceeding any material factual information (as distinct from indications of governmental policy) from other agencies that is directed to the contents of regulatory analysis documents. See ACUS Recommendation 80-6 (1 CFR §305.80-6).

f. Public Availability of Regulatory Analysis Documents. Agencies should make regulatory analysis documents available to the public when they publish proposed and final rules in the Federal Register, even if the Freedom of Information Act's exemption for intra-agency memoranda, 5 U.S.C. §552(b)(5), might apply to portions of the documents. As appropriate, agencies also should prepare brief summaries of regulatory analysis documents and make them available to the public and appropriate congressional committees. The summaries should contain tables, charts, and other devices, as needed, to make the information contained in the regulatory analysis documents understandable.

### 3. Use of Regulatory Analysis Where Not Required or Where Options Are Foreclosed

a. Regulatory analysis documents should identify the costs and benefits of reasonable options, even if the agency may lack the statutory authority to implement some of the options. If the agency determines that the best options cannot be implemented under its statutory authority, the agency should so inform the institutions with power to implement them, such as Congress and other agencies.

b. Agencies should consider using regulatory analysis when undertaking significant rulemaking proceedings with projected impacts falling below the established thresholds for requiring formal regulatory analyses.



#### 4. Information in Regulatory Analysis Documents

This part of the Recommendation addresses the information that should be included in regulatory analysis documents for use by the public and agency decisionmakers.<sup>2</sup>

a. When agencies use quantitative models to quantify important variables in regulatory analysis documents, the known limitations of those models should be clearly stated.

b. To prevent quantitative models from oversimplifying complex decisionmaking factors, agencies should require regulatory analysis documents to (1) state clearly the major assumptions that undergird the models relied upon in the regulatory analysis, and (2) describe important decisionmaking variables that are not subject to quantitative analysis.

c. Agencies should require that regulatory analysis documents attempt to characterize the uncertainties that are included in quantitative predictions by using tools such as confidence intervals, multiple assessment models, sensitivity analysis, and worst case analysis.

d. Agencies should require that regulatory analysis documents address explicitly the distributional impacts of rulemaking options and the methods used for discounting future costs and benefits. Agencies should consider using more than one discount rate to clarify the sensitivity of the analytical projections to the discount rate.

e. Agency regulatory analysis documents should make explicit reference to any agency policies that motivate the agency to choose one set of assumptions over another, draw one inference rather than another, or choose one quantitative model over another.

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2. The Conference has previously recommended that agencies using cost-benefit and similar analyses include in notices of particular proceedings certain information about the analytical methods and assumptions used in conducting the analyses. See ACUS Recommendation 79-4 (1 CFR §305.79-4).

## 5. Informational Needs for Regulatory Analysis

a. Agency Access to Information. Adequate information on the costs and economic impacts of proposed rules is essential to the regulatory process, and often the most important source of this information is a regulated party. Therefore, in exercising its authority under the Paperwork Reduction Act, the Office of Management and Budget should allow agencies to address reasonable requests for cost and economic impact information to regulated parties when the information is needed for regulatory analysis. The Office of Management and Budget should continue to coordinate its regulatory analysis review function with its paperwork reduction function to ensure that it approves information-gathering activities that are designed to yield information that it is likely to require later in the rulemaking review process.

b. Coordination of Information Gathering Activities. Agencies should coordinate their sponsored research activities with their regulatory analysis initiatives. More specifically, agencies should include regulatory analysts in their process for setting long-term research priorities. In addition, agencies should encourage the participation of representatives from the office responsible for agency-sponsored research in the rulemaking process at the very early stages when informational needs are defined.

c. Cooperative Regulatory Analysis. Agencies should consider whether the techniques suggested for negotiation of proposed regulations in ACUS Recommendation 82-4 (1 CFR §305.82-4) might be useful in undertaking, in specific proceedings, "cooperative regulatory analysis." This would consist of bringing representatives of all affected parties together, consistent with the Federal Advisory Committee Act where applicable, to assess the validity of particular studies prior to relying upon those studies in regulatory analysis documents.

d. Reducing Potential Bias. Agencies should attempt to reduce the impact of bias in the sources of the information that they use in preparing regulatory analysis documents. Though agencies should consider the source of information in giving it weight, this does not mean that they should automatically attach less value to information simply

because it comes from a source with an interest in the outcome of the rulemaking. Agencies should reduce the impact of bias by:

(i) consulting, whenever possible, multiple sources of information in preparing regulatory analysis documents;

(ii) carefully citing in regulatory analysis documents all information upon which the analysis draws, and making the information available for public scrutiny at convenient times and places;

(iii) actively soliciting comment and criticism from acknowledged experts in the fields that the documents address.

e. Retrospective Assessments of Previous Analyses. Agencies should regularly perform retrospective assessments of the predictions made previously in regulatory analysis documents. Retrospective analysis can provide information on the accuracy of past agency predictions and thereby enable an agency to increase the accuracy of future predictions or make judgments about the value of regulatory analysis to its regulatory effort.

#### 6. Use of Consultants in Preparing Regulatory Analysis Documents

Agencies can benefit from entering into consulting contracts with qualified experts to aid in gathering and analyzing information for regulatory analysis documents. However, agency personnel should retain the ultimate responsibility for the contents of regulatory analysis documents and guard against consultant conflict of interest. To these ends, agencies should ensure that: (1) agency employees, not consultants, draft regulatory analysis documents, and (2) when a regulatory analysis document relies upon consultant reports, the reports are placed in the public file of the rulemaking proceeding, even if the Freedom of Information Act's exemption for intra-agency memoranda, 5 U.S.C. §552(b)(5), might apply to portions of the reports.

#### 7. The Scope and Limits of Regulatory Analysis

a. Cost-benefit analysis is an effective tool for marshalling and analyzing information and for establishing regulatory priorities.



b. Other analytical techniques, such as cost-effectiveness analysis and multi-objective analysis, are also useful for rulemaking that involves health, environmental, historical, artistic, and aesthetic considerations for which markets do not exist.

c. Agency rulemaking decisions must take into account the limits of the agency's statutory authority and its overall policy goals, as well as the limits of the methods and data used in the regulatory analysis.

d. The same criteria should be used in granting exemptions from regulatory analysis requirements, irrespective of whether the proceeding has been commenced to formulate new rules or to amend or repeal existing rules.



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## Recommendation 93-4

### Improving the Environment for Agency Rulemaking

Adopted December 9, 1993

Informed observers generally agree that the rulemaking process has become both increasingly less effective and more time-consuming. The Administrative Procedure Act does not reflect many of the current realities of rulemaking. The APA's cumbersome "formal rulemaking" procedures are rarely used except in some adjudicative-type rate proceedings. Meanwhile, the APA's simple "informal rulemaking" procedures (set forth in 5 U.S.C. §553) have been overlain with an increasing number of constraints: outside constraints imposed by Congress, the President, and the courts, and internal constraints arising from increasingly complex agency management of the rulemaking process.<sup>1</sup> As a result, many federal agencies, faced with unsatisfactory rulemaking accomplishments in recent years, have turned to alternatives such as less formal policy statements or adjudicative orders to achieve regulatory compliance.<sup>2</sup>

The Conference believes that the environment for agency legislative rulemaking can be improved. This recommendation sets out a coordinated framework of proposals aimed at promoting efficient and effective rulemaking by addressing constraints on the current process that derive from a variety of sources. We present an integrated approach for improving the rulemaking environment in order to relieve agencies of unnecessary pressures and disincentives relating to rulemaking. We also identify desirable revisions of section 553 relating to legislative rulemaking. In doing so, this recommendation both presents new proposals and incorporates previous Conference recommendations.

#### Presidential Constraints

We continue to support presidential coordination of agency policymaking as beneficial and necessary.<sup>3</sup> We are concerned, however, that, unless properly focused, this additional review may impose unnecessary costs. All recent presidents have undertaken some level of review and coordination of agency rulemaking. Presidential review of rules, as undertaken under various executive orders applied by the Office of Management and Budget and other White House entities, has often required agencies to submit nearly all proposed and final rules to a review process in which the rules are screened and analyzed for consistency with presidential objectives. Some of these objectives have been incorporated into analytical

<sup>1</sup>See generally McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L. J. 1385 (1991).

<sup>2</sup>See Conference Recommendation 92-2, "Agency Policy Statements," 1 CFR § 305.92-2 (1993), which distinguished "legislative" rules, normally promulgated through notice-and-comment procedures, from interpretive rules and policy statements, which are exempt from such procedures. The present recommendation addresses legislative rulemaking.

<sup>3</sup>See Conference Recommendation 88-9, "Presidential Review of Agency Rulemaking" 1 CFR § 305.88-9 (1993) (applying Presidential oversight to both executive branch and independent agencies).

requirements found in separate executive orders.<sup>4</sup> This screening process can unduly slow the entire system of rulemaking; it can inhibit the growth of the promising consensus-based alternative of negotiated rulemaking;<sup>5</sup> and it can create undesirable tensions between the reviewing entities and agency policymakers. While these analytical emphases can be rationalized individually, in the aggregate, they can result in redundant requirements, boilerplate-laden documents, circumvention, delays, and clutter in the *Federal Register*. Although specific presidential review policies have varied among Administrations, these recommendations set forth principles that the Conference believes generally should govern presidential review of rules.

We therefore recommend that presidential oversight and review be reserved for the most important rules and that the agencies be given clear policy guidance in a directive, approved by the President, specifying what is required. In addition, the reviewing or oversight entity should avoid, to the extent possible, extensive delays in the rulemaking process. The review process itself should be open to public scrutiny—following guidelines previously developed by the Administrative Conference.<sup>6</sup> The President's policy should encourage planning and coordination of regulatory initiatives, and early dialogue between agencies and the reviewing entity. To this end, the concept of a unified agenda of regulations is a useful tool and should be preserved. We also believe that additional non-APA analytical requirements should be kept to a minimum. The cumulative impact of such requirements on the rulemaking process should be considered before existing requirements are continued or additional ones imposed. We also believe it is useful to periodically reassess the continued viability and relevance of the various presidential directives.<sup>7</sup>

### Legislative Constraints

Congress should similarly review and rationalize legislatively-mandated rulemaking procedures. Specifically, we recommend that it refrain, as it generally has done since the 1970s, from imposing program-specific rulemaking requirements that go beyond the APA's basic notice-and-comment procedures.<sup>8</sup> Statutory "on-the-record" and "hybrid" rulemaking provisions that require adjudicative fact-finding techniques such as cross-examination, or more stringent provisions for judicial review (in particular, use of the "substantial evidence" test instead of the normal "arbitrary and capricious" test), can be unnecessarily burdensome or confusing and should be repealed.<sup>9</sup> Although additional procedures can sometimes be beneficial—see, e.g., §307 of the Clean Air Act (providing additional safeguards for rulemaking with significant economic and competitive effects)<sup>10</sup>—they should be imposed only after careful review and attention by Congress to possible unintended consequences. Otherwise, such additions generally should be left to the discretion of individual agencies.<sup>11</sup>

Similarly, legislatively-imposed time limits on rulemaking, while understandable, can be unrealistic, resulting in either hastily-imposed rules or missed deadlines that undermine respect for the rulemaking process.<sup>12</sup> Legislative deadlines backed by statutory or regulatory "hammers" (mandating, for example,

<sup>4</sup>Among the mandates reflected in these executive orders are requirements that agency rulemakers include cost-benefit estimates and analyses of the proposed and final rule's impact on federalism, family values, and future litigation, of whether it effects a "regulatory taking," and of other matters. The Conference of course takes no position on the merits of the values underlying these executive orders.

<sup>5</sup>See Conference Recommendations 82-4 and 85-5, "Procedures for Negotiating Proposed Regulations," 1 CFR §§ 305.82-4, 305.85-5 (1993); "Negotiated Rulemaking Act of 1990, 5 U.S.C. §§561-69.

<sup>6</sup>See Conference Recommendation 88-9, "Presidential Review of Agency Rulemaking," 1 CFR § 305.88-9 (1993) at ¶4.

<sup>7</sup>While the most recent executive order of presidential review of rules generally reflects the views set forth in this recommendation, see Executive Order 12866, 58 Fed. Reg. 51735 (1993), the Conference takes no position on the specifics of that order.

<sup>8</sup>See Conference Recommendation 76-3, "Procedures in Addition to Notice and the Opportunity to Comment in Informal Rulemaking," 1 CFR § 305.76-3 (1993).

<sup>9</sup>See Conference Recommendation 80-1, "Trade Regulation Rulemaking Under the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act," 1 CFR § 305.80-1 (1993).

<sup>10</sup>42 U.S.C. §7607.

<sup>11</sup>See Conference Recommendation 76-3, "Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking," 1 CFR § 305.76-3 (1993).

<sup>12</sup>See Conference Recommendation 78-3, "Time Limits on Agency Action," 1 CFR § 305.78-3 (1993).



that the proposed rule or some other policy change<sup>13</sup> automatically take effect upon expiration of the deadline) are particularly undesirable and often counter-productive;<sup>14</sup> they are generally less desirable than the alternative of judicial enforcement of deadlines.<sup>15</sup>

Finally, legislation ancillary to the APA that creates additional rulemaking impediments should be reconsidered. Statutes such as the Regulatory Flexibility Act, which requires a special analysis of virtually all rules' effects on small business, may have laudable intentions, but their requirements are often both too broadly applicable and not sufficiently effective in achieving their goals. If such requirements are imposed, Congress should focus them more narrowly, by, for example, confining their application to significant rules or particular categories of rules.

### Judicial Constraints

Other constraints on rulemaking that warrant similar reconsideration have been imposed through judicial review. The APA, in section 706, provides that agency rules may be set aside if they are "arbitrary or capricious," represent an "abuse of discretion," or are "otherwise not in accordance with law." The evolving scope of judicial review of agency rules, along with the timing of much such review at the preenforcement stage, has contributed to what is sometimes an overly intrusive inquiry. This, in turn, has led agencies to take defensive measures against such review. While some tension is an inevitable adjunct of the process of judicial review, we believe that steps can be taken to lessen some of the burdens without loss of effective outside scrutiny of agency rules.

The tendency of some courts to require extra-APA procedures in rulemaking was arrested by the Supreme Court's *Vermont Yankee* decision in 1978.<sup>16</sup> Nevertheless, while the prevailing judicial interpretation of the arbitrary-and-capricious standard of review (which became known as the "hard look doctrine") has promoted reasoned decisionmaking, courts have not infrequently remanded rules on the basis of an agency's failure to respond adequately to comments, consider relevant factors, or explain fully the bases for its rule. Courts should be sensitive not to require greater justification for rules than necessary; a reasoned statement that explains the basis and purpose of the rule and addresses significant issues raised in public comments should be adequate.

Preenforcement review, expanded by the Supreme Court in the 1967 *Abbott Laboratories* cases,<sup>17</sup> endorsed by the Conference in various recommendations,<sup>18</sup> and codified in numerous rulemaking programs, has the virtue of settling legal issues early and definitively. When overused, however, preenforcement review can have the negative effect of inducing precautionary challenges to most rules and the raising of as many objections to a rule as possible, including somewhat speculative challenges pertaining to the rule's potential application.

Under the *Abbott Laboratories* standard, challenges to a rule are permitted where issues are appropriate for judicial review and where the impact on a challenger is direct and immediate. The Conference believes that the *Abbott Laboratories* standard strikes a sensible balance, and that preenforcement challenges generally are appropriate where the administrative record provides a sufficient basis for the court to resolve the issues before it. Thus, a preenforcement challenge to a rule based on the procedures used in the rulemaking should normally be permitted. Preenforcement review that involves a facial challenge to a rule's substantive validity (whether because of a conflict with a statute or the Constitution, or because of the inadequacy of the facts or reasoning on which it is based) should also

<sup>13</sup>See, e.g., Conference Recommendation 90-8, "Rulemaking and Policymaking in the Medicaid Program," 1 CFR § 305.90-8 (1993).

<sup>14</sup>Where the "hammer" applied because of a failure to meet a deadline is that a proposed rule becomes effective, the anomalous result is that a policy that has withstood no public airing will be implemented.

<sup>15</sup>Courts should continue, where appropriate, to consider whether agency action in a rulemaking is "unreasonably delayed." See 5 U.S.C. § 706(1); Telecommunications Research and Action Center v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984).

<sup>16</sup>*Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

<sup>17</sup>*Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967).

<sup>18</sup>See Conference Recommendation 74-4, "Preenforcement Judicial Review of Rules of General Applicability," 1 CFR § 305.74-4 (1993); Conference Recommendation 91-5, "Facilitating the Use of Rulemaking by the National Labor Relations Board," 1 CFR § 305.91-5 (1993).

generally be heard.<sup>19</sup> In contrast, challenges to a rule because it might be applied in a particular way should normally be deferred until the rule has actually been applied.

Although prompt resolution of legal issues is to be encouraged, Congress should be cautious in coupling mandated time-limited preenforcement review with preclusion of review at the enforcement stage. Such time-limited review should be provided for only in the situations and conditions specified in Recommendation 82-7.<sup>20</sup> Where Congress does set time limits for preenforcement review, it should, in the interests of consistency, generally specify that preenforcement review should occur within 90 days of a rule's issuance. Current statutory specifications vary. There does not seem to be any reason for variation that outweighs the benefits of uniformity in this context.

Congress should also amend any existing statutes that mandate use of the "substantial evidence" test for reviewing legislative rules, by replacing it with the "arbitrary and capricious" test. The occasional introduction of the substantial evidence test in the rulemaking context has created unnecessary confusion; some courts apply it in a manner identical to that of the "arbitrary and capricious" test; others believe that it sets a higher standard. The Conference believes that the arbitrary and capricious test provides sufficient review in the informal rulemaking context.

The intensity of judicial review directly affects the rulemaking process. For example, the scope of review of agency statutory interpretations is governed by the deferential *Chevron* test, which requires affirmance if the agency's interpretation of an ambiguous statute is permissible.<sup>21</sup> On the other hand, when reviewing the reasonableness of an agency's policy and factual justifications for its rules, courts apply the stricter "hard look" doctrine.<sup>22</sup> Deferential review of the legal issue of statutory interpretation, coupled with the rigorous review of a rule's factual and policy underpinnings that the "hard look" doctrine specifies, has been criticized as anomalous. The Conference believes, however, that the review standards can be harmonized by looking beyond the labels. That is, under both of these doctrines, courts are required to determine independently the limits of the agency's statutory authority and whether the factors the agency took into account in formulating the rule were permissible. Following that determination, courts properly defer to an agency's permissible reading of its statute and to its choice of inferences from the facts in making policy decisions. Courts would help make their review more consistent and predictable if they articulated more clearly this two-step approach. Both the *Chevron* and "hard look" doctrines would then be understood as including a searching review of the range of an agency's legally permissible choices (statutory, policy, and factual), combined with, in each instance, deference to the agency's reasonable selection among such choices, once the alternatives are determined to be within the permissible range.

Finally, in order to prevent additional litigation, courts should be encouraged to address certain issues that arise in many if not most reviews of rules. Reviewing courts should, for example, specify, to the extent feasible, which portions of the rule, if any, are to be set aside, vacated, stayed or otherwise affected by the decision in the case. They should seek to ensure that portions of a rule unaffected by a finding of illegality remain in effect, unless the rule expressly or impliedly indicates that the rule is inseverable. A reviewing court should also consider the extent to which its mandate will apply retroactively. In considering the effect to be given to its decision, the court should weigh the impact of the decision on parties not before the court, and recognize their interest in being heard or adequately represented prior to any ruling that adversely affects them.

#### Amendment of the APA

As we approach the fiftieth anniversary of the APA, some of its rulemaking provisions need to be updated. Section 553(c), which does not now state a length of time for the comment period, should be

<sup>19</sup>A challenge based on the facial invalidity of the rule, in this context, would normally be directed at a requirement or course of action to which the agency has clearly committed itself.

<sup>20</sup>Recommendation 82-7, "Judicial Review of Rules in Enforcement Proceedings," 1 CFR § 305.82-7 (1993), sets out criteria for when judicial review should be limited at the enforcement stage, and what kinds of issues should remain reviewable at that stage.

<sup>21</sup>*Chevron USA Inc. v. NRDC*, 467 U.S. 837 (1984).

<sup>22</sup>*Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) (State Farm).

amended to specify that a comment period of "no fewer than least 30 days" be provided (although a good cause exception for shorter periods should be incorporated). This would relieve agencies of the need to justify comment periods that were 30 days or longer. The thirty-day period is intended as a minimum, not a maximum; agencies would still be encouraged to allow longer comment periods and to leave the record open for the receipt of late comments.<sup>23</sup> Section 553 should also specify that a second round of notice and comment is not required where the final rule is the "logical outgrowth" of the proposed rule, thus codifying generally accepted doctrine.<sup>24</sup> A provision requiring maintenance of a public rulemaking file should be incorporated into section 553, so that those who seek access to the file are not forced to rely on the Freedom of Information Act to obtain it.<sup>25</sup> (The content of such a file is discussed further below in connection with internal agency management initiatives.)

In addition, the requirement in section 553(c) of a statement of basis and purpose for the rule should be revised to require a "reasoned statement"<sup>26</sup> (deleting the "conciseness" provision), which includes a response to significant issues raised in the public comments.<sup>27</sup> These changes are designed to codify the salutary aspects of the caselaw on rulemaking, discourage insubstantial arguments and objections on review, and stem the tendency to require additional, more burdensome justifications.

Another long-overdue change in the Act is elimination of section 553(a)(2)'s exemption from notice-and-comment procedures for matters relating to "public property, loans, grants, benefits, or contracts." As the Conference recognized as early as 1969, this "proprietary exemption" is an anachronism.<sup>28</sup> The exemption for "military or foreign affairs function[s]" in section 553(a)(1) should be narrowed so that all but secret aspects of those functions are open to public comment.<sup>29</sup>

### Internal Agency Management Initiatives

Rulemaking is not just a product of external constraints. The agency's own processes for developing rules and reviewing them internally affect the rulemaking environment. Thus, agency management initiatives can have a significant impact on the effectiveness and efficiency of rulemaking. The Conference recommends a number of steps agency managers can take to improve their internal processes.

Senior agency staff should develop management strategies to set priorities and track agency rulemaking initiatives.<sup>30</sup> Agencies should seek to involve the presidential oversight entity in the rulemaking process as early as feasible, in order to reach agreement on the significance of rules in the developmental stage, to provide greater coordination, and to speed final oversight review. Agencies should also review their existing systems for developing and reviewing regulations, to determine where problems and bottlenecks are occurring. They should seek to achieve more rapid internal clearances of

<sup>23</sup>See Conference Statement #7, "Views of the Administrative Conference on Proposals Pending in Congress to Amend the Informal Rulemaking Provisions of the Administrative Procedure Act," 1 CFR §310.7 (para. 2).

<sup>24</sup>See *South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974), in which the 1st Circuit originated the "logical outgrowth" test. It was subsequently embraced by other circuits, particularly the D.C. Circuit. See *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991); *International Union, United Auto, Aerospace and Agr. Implement Workers of America v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991); *American Medical Association*, 887 F.2d 760 (7th Cir. 1989); *NRDC v. USEPA*, 824 F.2d 1258 (1st Cir. 1987); *United Steelworkers v. Schuykill Metal Corp.*, 828 F.2d 314 (5th Cir. 1987); *National Black Media Coalition v. FCC*, 791 F.2d 1016 (2nd Cir. 1986); *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098 (4th Cir. 1985).

<sup>25</sup>Statement # 7, supra n. 23, at ¶4.

<sup>26</sup>*State Farm*, supra n. 22, 463 U.S. at 57 (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)).

<sup>27</sup>Conference Statement #7, supra n. 23, at ¶5.

<sup>28</sup>See Conference Recommendation 69-8, "Elimination of Certain Exemptions From the APA Rulemaking Requirements," 1 CFR § 305.69-8 (1993).

<sup>29</sup>See Conference Recommendation 73-5, "Elimination of the 'Military or Foreign Affairs Function' Exemption from APA Rulemaking Requirements," 1 CFR § 305.73-5 (1993).

<sup>30</sup>See Conference Recommendation 87-1, "Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration," 1 CFR § 305.87-1 (1993).



proposed and final rules, and to develop reasoned analyses<sup>31</sup> and responses to significant issues raised in public comments. They should also take steps to manage the rulemaking file (and associated requests for access to it).<sup>32</sup> The file should, to the extent feasible, contain notices of the rulemaking, all written<sup>33</sup> comments submitted to the agency, and copies or an index of all written factual material, studies, or reports substantially relied on or seriously considered by the agency in formulating its proposed and final rule (except insofar as disclosure is prohibited by law). Materials substantially relied on or seriously considered need not encompass every study, report, or other document that the agency may have in its files or has otherwise used, but they should include those that exerted a significant impact on the agency's thinking, even if they represent an approach that the agency ultimately did not accept.

Agencies should also consider innovative methods for developing and getting public input on rules. Agencies should use advisory or negotiated rulemaking committees where appropriate to improve the quality and acceptability of rules.<sup>34</sup> They should also consider the use of "direct final" rulemaking where appropriate to eliminate double review of noncontroversial rules. Direct final rulemaking involves issuing a rule for notice and comment, with an accompanying explanation that if the agency receives no notice during the comment period that any person intends to file an adverse comment, the rule will become effective 30 days (or some longer period) after the comment period closes.

## RECOMMENDATION

To improve the environment for agency legislative rulemaking, the President, Congress, and the courts should take steps to eliminate undue burdens on agency legislative rulemaking; Congress should update the Administrative Procedure Act's rulemaking provisions; and agencies should review their internal rulemaking environment and, where appropriate, implement internal management initiatives aimed at improving the effectiveness and efficiency of their efforts.

### I Presidential Oversight<sup>35</sup> of Rulemaking

A. The President's program for coordination and review of agency rules should be set forth in a directive that is reviewed periodically. The program should be sensitive to the burdens being imposed on the rulemaking process, and implementation of the program should ensure that it does not unduly delay or constrain rulemaking. The President should consider the cumulative impact of existing analytical requirements on the rulemaking process before continuing these requirements or imposing new ones.<sup>36</sup>

B. The President's directive, as well as the explanations provided and the procedures followed by the presidential oversight entity, should, insofar as practicable:

<sup>31</sup>See Conference Recommendation 85-2, "Agency Procedures for Performing Regulatory Analysis of Rules," 1 CFR § 305.85-2 (1993); Conference Recommendation 88-7, "Valuation of Human Life in Regulatory Decisionmaking," 1 CFR § 305.88-7 (1993).

<sup>32</sup>Computerized access should be made available, preferably in a uniform system government-wide. See Conference Recommendation 88-10, "Federal Agency Use of Computers in Acquiring and Releasing Information," 1 CFR § 305.88-5 (1993).

<sup>33</sup>"Written" includes documents in electronic form.

<sup>34</sup>Any government-wide policy concerning the use of advisory committees should be consistent with their use as part of the process of negotiated rulemaking.

<sup>35</sup>The recommendations contained in this section apply to oversight of both executive and independent agencies. The Conference has previously recommended that presidential review of rulemaking apply to the independent agencies to the same extent it applies to the rulemaking of the Executive Branch departments and agencies. See Conference Recommendation 88-9, "Presidential Review of Agency Rulemaking," 1 CFR § 305.88-9 (1993).

The term "presidential oversight entity," as used herein, is that part of the Executive Office of the President delegated responsibility for review and oversight of agency rulemaking.

<sup>36</sup>In recommending review of analytical requirements beyond those contained in the APA, we express no position on the substantive policies being mandated.

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1. Promote dialogue and coordination between the oversight entity and rulemaking agencies in the early identification and selection of rules warranting application of the review process;
2. Set forth the relevant analytical requirements that the oversight entity should apply to agency rulemaking, and provide interpretive guidance to assist agencies in complying with these requirements;
3. Ensure appropriate expedition and openness in the process, in accordance with Conference Recommendation 88-9;
4. Support a process for planning regulatory initiatives and tracking rule development; and
5. Encourage and support agency efforts to use consensual processes such as negotiated rulemaking.

## II. Congressional Structuring of Rulemaking

A. Section 553 of Title 5, United States Code, which established the framework for legislative rulemaking, has operated most efficiently when not encumbered by additional procedural requirements. Congress generally should refrain from creating program-specific rulemaking procedures or analytical requirements beyond those required by the APA. When Congress determines that additional procedures beyond those required by section 553 are justified by the nature of a particular program, such procedures should be focused on identified problems and, where possible, adopted incrementally or after experimentation.<sup>37</sup> In addition, Congress should repeal formal ("on-the-record") or other adjudicative fact-finding procedures in rulemaking in any existing statutes mandating such procedures.<sup>38</sup>

B. In general, Congress should not legislate time limits on rulemaking, but should instead rely on judicial enforcement of prompt agency action under §706(1) of the APA.<sup>39</sup> However, if Congress determines that a deadline is appropriate, it also should ensure that the agency has sufficient resources to support the required rulemaking effort without distorting the agency's other regulatory functions. If Congress further determines that a default rule is necessary where an agency does not meet a deadline, it should specify the terms of that rule and, in particular, should not impose "regulatory hammers" that would cause the agency's proposed rules to take effect automatically.

C. Congress should reconsider the need for continuing statutory analytical requirements that necessitate broadly applicable analyses or action to address narrowly-focused issues.<sup>40</sup> If Congress nonetheless determines that such analytical requirements are necessary, Congress should structure its requirements more narrowly (e.g., by confining their application to the most significant rules or to rules likely to be affected by the stated concern).

<sup>37</sup>See, for example, the development of more specific, but not necessarily more burdensome, procedures for EPA rulemaking that has significant economic and competitive effects. See 42 U.S.C. §7607 (§307 of the Clean Air Act). See also Conference Recommendation 76-3, "Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking," 1 CFR § 305.76-3 (1993), which encourages agency experimentation with use of oral procedures beyond simple notice and comment in some circumstances.

<sup>38</sup>Conference has recommended against the mandated use of cross-examination and other "adjudicative" procedures for agency fact-finding in rulemaking. See, e.g., Conference Recommendation 79-1, "Hybrid Rulemaking Procedures of the Federal Trade Commission," 1 CFR § 305.79-1 (1993). The Conference recognizes, however, that more formal procedures may be appropriate for rulemaking based on party-related facts. See *United States v. Florida East Coast RR*, 410 U.S. 224 (1973). Congress may also wish to consider whether less formal hybrid processes may be useful in contexts currently requiring formal rulemaking.

<sup>39</sup>This is not a comment on the legitimacy of congressional directives in this regard, but on their impracticality. On the other hand, agency self-imposed deadlines are encouraged, see V(D), below. For more detailed advice on time limits, see paragraph 5 of Conference Recommendation 78-3, "Time Limits on Agency Action," 1 CFR § 305.78-3 (1993).

<sup>40</sup>See, e.g., the Regulatory Flexibility Act of 1980. The Conference takes no position on the substantive issues the Act seeks to address. Insofar as possible, however, such concerns are more appropriately included in the President's oversight guidelines. See I(B)(2) above.

### III. Timing and Scope of Judicial Review

Congress and the courts generally should be sensitive to the impact of judicial review on agency rulemaking and should seek to simplify, clarify, and harmonize provisions for judicial review of rules.

#### A. Congress and the Courts

In determining whether preenforcement challenges to rules are appropriate, courts have traditionally evaluated "both the fitness of the issues for judicial decision and the hardship to the parties of withholding its consideration."<sup>41</sup> Adherence to this standard benefits both agencies and those affected by agency rules. Congress generally should authorize and courts should allow preenforcement challenges where the administrative record is a sufficient basis for resolving the issues. Thus, preenforcement challenges to a rule based on the procedures used in the rulemaking or on the asserted substantive invalidity of the rule, however it would be applied, should normally be permitted. Claims of substantive invalidity would include facial challenges based on statutory or constitutional grounds, or asserting the inadequacy of the facts or reasoning underlying the rule. Challenges to a rule on the basis that the rule might be applied in a particular way should normally be deferred until the application seems likely or has occurred.

#### B. Congress

1. Congress should be cautious in mandating time-limited preenforcement review coupled with preclusion of review at the enforcement stage, and should rely on time limits only in the situations and conditions specified in Recommendation 82-7.<sup>42</sup> Congressional time limits on preenforcement review should be understood to bar later challenges in the enforcement context only to the extent specified by Congress. Where Congress mandates a time limit on preenforcement review, it generally should specify that such review be requested within 90 days of the issuance of the rule.<sup>43</sup> It should also provide that preenforcement review cases be directly reviewable in the courts of appeals, and that a stay or partial stay of the rule's effectiveness ordinarily be issued only on the demonstration of likelihood of success on the merits and the prospect of significant private harm if the rule is permitted to take effect.

2. The standards set out in §706(2)(A) of the APA's judicial review provisions should apply in all cases involving review of rules. Specifically, Congress should not provide for the use of the "substantial evidence" test for agency rules. It should conform existing statutes to this standard by deleting the use of the "substantial evidence" test for review of agency rules.

#### C. Courts

1. In articulating the doctrines used in the judicial review of rulemaking, reviewing courts should more clearly harmonize the deferential *Chevron* doctrine, applied in reviewing agency interpretation of its statutory authority, with the "hard look" doctrine, used in examining an agency's justification for its rule. Courts, in applying these doctrines, should recognize that both the *Chevron* and "hard look" tests call for a searching review of the range of factors or permissible choices that may be considered by the agency, and require deference to agency application of those factors once they are shown to be legally appropriate.

2. When reviewing an agency's explanation for its rule, courts should consider the context of the entire proceeding and concern themselves principally with whether the agency's overall explanation and analysis is reasonable, including its response to the significant issues raised in public comments.

<sup>41</sup> *Abbott Laboratories v. Gardner*, supra n. 17, 387 U.S. at 149.

<sup>42</sup> See Conference Recommendation 82-7, "Judicial Review of Rules in Enforcement Proceedings," 1 CFR § 305.82-7 (1993).

<sup>43</sup> Congress should likewise reevaluate existing statutes for conformity with this approach.



3. In reviewing challenges to agency rules, courts should, to the extent feasible and after taking into account the effect of the decision on affected persons not before the court, consider: (a) whether any portion of a rule unaffected by a finding of illegality should remain in full force and effect; (b) which portions of the challenged rule, if any, are to be set aside, vacated, stayed, or otherwise affected by the court's decision in a case; and (c) the extent to which the court's mandate should apply retroactively.

4. Courts should continue, where appropriate, to consider whether agency action in a rulemaking is "unreasonably delayed."<sup>44</sup>

#### IV. Amendments to the APA's Legislative Rulemaking Provisions

Congress should update the APA and eliminate outmoded provisions. It should codify court decisions that have increased the effectiveness of public participation in the rulemaking process. In particular, Congress should consider amending section 553 of the APA to:

A. Eliminate the exemption (§553(a)(2)) for rules relating to public property, loans, grants, benefits or contracts, and delete the exemption (§553(a)(1)) of military and foreign affairs matters, except for secret matters;<sup>45</sup>

B. Specify a comment period of "no fewer than 30 days" (§553(c)),<sup>46</sup> provided that a good cause provision allowing shorter comment periods or no comment period is incorporated, and codify the doctrine holding that a second round of notice and comment is not required if the final rule is a "logical outgrowth" of the noticed proposed rule;

C. Require establishment of a public rulemaking file beginning no later than the date on which an agency publishes an advance notice of proposed rulemaking or notice of proposed rulemaking, whichever is earlier.

D. Restate the "concise" statement of basis and purpose requirement (§553(c)) by codifying existing doctrine that a rule must be supported by a "reasoned statement," and that such statement respond to the significant issues raised in public comments.

To the extent permitted by law, agencies should adopt these proposed policies pending Congressional action.

#### V. Agency Management Initiatives

In order to improve their internal rulemaking environments, agencies should develop management techniques to ensure efficient and effective administration of rulemaking. Such techniques should include:

A. Systematically setting priorities at the highest agency levels and tracking rulemaking initiatives, including identifying clearly who has the authority to ensure that agency schedules and policies are followed;

<sup>44</sup>See n. 15, 39, *supra*.

<sup>45</sup>See Conference Recommendation 69-8, "Elimination of Certain Exemptions From the APA Rulemaking Requirements," 1 CFR § 305.69-8 (1993), and Conference Recommendation 73-5, "Elimination of the 'Military or Foreign Affairs Function' Exemption from APA Rulemaking Requirements," 1 CFR § 305.73-5 (1993). The latter recommendation urged eliminating the APA's categorical exemption for matters pertaining to the military or foreign affairs function. It does recognize, however, that a modified exemption may be appropriate for matters "specifically required by executive order to be kept secret in the interest of national defense or foreign policy."

<sup>46</sup>The 30-day period is intended as a minimum, not a maximum. Agencies are encouraged to use longer periods for public comment.

B. Coordinating with the presidential oversight entity on the identification of rules warranting review as early in the process as is feasible, and establishing internal review procedures at the highest levels to ensure compliance with presidential analytical requirements;

C. Reviewing the agency's existing system for developing and reviewing regulations, to determine where problems and bottlenecks are occurring, and to improve and streamline the process;

D. Achieving timely internal clearances of proposed and final rules, using, where feasible, publicly announced schedules for particular rulemaking proceedings;

E. Managing rulemaking files, so that maximum disclosure to the public is achieved during the comment period and so that a usable and reliable file is available for purposes of judicial review. The rulemaking file should, insofar as feasible, include (1) all notices pertaining to the rulemaking, (2) copies or an index of all written<sup>47</sup> factual material, studies, and reports substantially relied on or seriously considered by agency personnel in formulating the proposed or final rule (except insofar as disclosure is prohibited by law), (3) all written comments submitted to the agency, and (4) any other material required by statute, executive order, or agency rule to be made public in connection with the rulemaking.<sup>48</sup>

F. Making use, where appropriate, of negotiated rulemaking and advisory committees;

G. Considering innovative methods for reducing the time required to develop final rules without eliminating the opportunity for consideration and comment;

H. Taking steps to ensure that proposed rules are acted on in a reasonably timely manner or withdrawn; and

I. Evaluating and reconsidering existing rules and initiating amendments and repeals where appropriate.

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<sup>47</sup>"Written" includes documents in electronic form.

<sup>48</sup>See Conference Statement #7, 1 CFR §310.7 (1993), "Views of the Administrative Conference on Proposals Pending in Congress to Amend the Informal Rulemaking Provisions of the Administrative Procedure Act."

## 1 CFR Ch. III (1-1-93 Edition)

§ 305.69-8 Elimination of Certain Exemptions from the APA Rulemaking Requirements (Recommendation No. 69-8).

## RECOMMENDATION

In order to assure that Federal agencies will have the benefit of the information and opinion that can be supplied by persons whom regulations will affect, the Administrative Procedure Act requires that the public must have opportunity to participate in rulemaking procedures. The procedures to assure this opportunity are not required by law, however, when rules are promulgated in relation to "public property, loans, grants, benefits, or contracts." These types of rules may nevertheless bear heavily upon non-governmental interests. Exempting them from generally applicable procedural requirements is unwise. The present law should therefore be amended to discontinue the exemptions to strengthen procedures that will make for fair, informed exercise of rulemaking authority in these as in other areas.

Removing these statutory exemptions would not diminish the power of the agencies to omit the prescribed rulemaking procedures whenever their observances were found to be impracticable, unnecessary, or contrary to the public interest. A finding to that effect can be made, and published in the *FEDERAL REGISTER*, as to an entire subject matter concerning which rules may be promulgated. Each finding of this type should be no broader than essential and should include a statement of underlying reasons rather than a merely conclusory recital.

Wholly without statutory amendment, agencies already have the authority to utilize the generally applicable procedural methods even when formulating rules of the exempt types now under discussion. They are urged to utilize their existing powers to employ the rulemaking procedures provided by the Administrative Procedure Act, whenever appropriate, without awaiting a legislative command to do so.



## STATEMENT OF ERNEST GELLHORN, ESQ.

Mr. GELLHORN. Mr. Chairman, members of the committee, I would just make really five points. First, I think H.R. 9 is an important proposal insofar as it would provide statutory recognition to Presidential oversight. It has occurred now for over 20 years but it has never had specific statutory authorization. So I think the central thesis is an excellent one.

The second point I would make is that the proposed section, title VII, has an important addition by extending that Presidential oversight over the independent agencies, because the Presidential Executive orders have never included the independent agencies. So that is excellent.

The third point I would make, in support of is that the central core message of adoption of a regulatory impact analysis is, I think, worthy of support, and that is also included in the Reagan order and in many respects in the Clinton order.

However, I would make as a fourth point that the bill H.R. 9 as drafted is complex, wordy, difficult to understand, and, frankly, often confusing to follow. Let me be specific on it. If you look, for example, at section 7004, it has 23 commands for assessing regulatory impacts. The Ten Commandments were good enough a long time ago. I think there are way too many, and they are repetitive and they make, frankly, almost silly points. To tell an agency that it must tell a regulated person that you may have to consult a lawyer to see whether you comply or an accountant does not add anything or improve public understanding. So I would say take the 23 points, get to the central core of it and cut it down to 2 or 3.

In addition, if you look at section 7006, it is a directive to the agencies to write their regulations in simple, clear words, yet it is verbose, repetitive, and redundant. It does not heed its own message. If you just limited it to subsection 1 it would not be a bad provision but it goes on and on.

So I would urge the committee to take the ideas, in H.R. 9, cut them down to simple language, focus on the regulatory impact analysis, and not give so many confusing directions. So modified, I would endorse H.R. 9.

The final point I would make on judicial review is to put before the committee some proposed language for a new subsection or to add a new subsection (d) in section 7004 before the definitions. The language would be as follows: "That enforcement of this section shall be reviewable only pursuant to 5 U.S.C., section 706(2)(A)." That is the standard "arbitrary and capricious" language of the Administrative Procedure Act. Such review should also be limited to the substantive standards set forth in subsection (c).

In essence, what that would do is say the only judicial review shall be for matters of substance as directed in regulatory impact analysis rather than create a new procedural morass for rule-making review.

Thank you very much.

Mr. GEKAS. Thank you.

Mr. Bass.

**STATEMENT OF GARY D. BASS, PH.D., EXECUTIVE DIRECTOR,  
OMB WATCH**

Mr. BASS. Thank you, Mr. Chairman. Assuming my statement will be submitted for the record, I will summarize.

Mr. GEKAS. Yes, without objection, your statement will be incorporated in the record.

Mr. BASS. I will be speaking to the problems with H.R. 9. Not just from OMB Watches' perspective but from a number of organizations that are involved in labor issues, environment, human needs, and a host of areas that deal with the social benefits from public protections and safeguards.

Today, most of the testimony focused on the economic impact and the horror stories that have occurred because of government regulation. All of us in this room are vastly familiar with the social benefits, such as the woman whose child died from food poisoning, or the worker who lost an arm in the workplace, or, for that matter, the community that has a chemical plant with an explosion where people are endangered. That is precisely why Congress wrote the laws, and precisely why the executive branch has the important responsibility to carry out and enforce those laws, which are meant to ensure the health and safety of Americans.

Now, there is no doubt that there are stupid regulations. There is no doubt that the system needs improvements and reform. What H.R. 9 does, in its entirety, is really throw the baby out with the bath water and we cannot let that happen.

The notion of title VII—let me say, I was once taught never to use more than five points because I could hold five fingers up and still pound with my other hand and make my case. I will violate my principle and mention eight points. I will probably go to the ninth, even.

First of all, I have a real problem with codifying Executive Order 12291. Executive Order 12291 had problems, and that is precisely why the Clinton administration enacted Executive Order 12866. For example, we just heard a second ago about the need for greater accountability that Executive Order 12886 brought. Openness is critical to accountability. Executive Order 12291 operated with a veil of secrecy. Executive Order 12866 opened up the door.

Secondly, by opening up the door, there was a greater understanding that the delays in the regulatory review process under 12291 ended. The only way we could ever have known that, or for that matter Congress could have known, was by having that openness and accountability. The system is open today—it is so open that now we can find by looking on the Internet the status of any given regulation.

Thirdly, 12886 made improvements in the sense of focusing all OMB resources all over the board. It focused on the most significant regulations, and so narrowed its focus to really work on specific regulations. If we codify 12291, we not only lose the benefits of what we have learned over time but we will have problems in the future. That is not to say we should codify 12866. It is to say that there are problems with codifying anything like this. You want to give the President some flexibility in how to carry out the laws of the land. Also, you do not want to lock Congress into any one particular procedure.

Having said that, I also believe that Congress has an important responsibility to exercise its oversight authority on this regulatory process. Congress must do it vigorously, and, up to now, it has not done so. It has done it in a politically charged atmosphere.

The second point I want to make is that H.R. 9, and particularly title VII, combined with title III, creates an enormous bureaucracy. Overkill, if you will. You know, I have not heard today the words "paralysis by analysis" and maybe it is because everyone has used it so many times, but I am going to use it. This presents paralysis by analysis. If we apply a regulatory impact analysis to virtually every regulation, then we are going to have an overly prescriptive, ossified regulatory process. The 23 elements the RIA is just too much. Furthermore, the RIA requirements will also expand the scope of title III, which requires risk assessment and peer reviews. Title III requires risk assessment and peer reviews for rules with major policy impacts. Title VII is more expansive in its scope, but calls rules under its scope major policy. Since the RIA includes risk assessments, it will also trigger peer reviews under title III. If that is not enough, you have expanded the Regulatory Flexibility Act to include direct and indirect effects. I have no idea what an indirect effect is.

There is, I should say, an enormous inconsistency and bureaucracy added to this process. In addition, suddenly everything is going to become judicially reviewable, so before the public sees something in the Federal Register, the potential exists that somebody can stop the process.

EPA has identified very specifically what this would do. They say that their current average time to do a regulation is 36 months. Under just title VII and title III the numbers reverse. Instead of 36, you will have 63 months, on the high end, although they give a range. On the high end, it will be 5 years to get a regulation out.

Mr. Maher's example about dredging, if taken under the definition of Executive Order 12291, it would require that permits and various other agency guidelines would be brought under this review process. Five years to get something done.

Secondly, it will cost, according to EPA's estimate, an additional hundred million dollars per year to carry out the requirements of title VII and title III. That more than doubles existing expenditures.

Now, the question is, where is this money going to come from? The House has just passed a constitutional amendment to balance the U.S. budget. We are talking about a time of scarce resources. What that will end up meaning is that there will be no enacting of public protections because you will not be able to get the work done.

My third point is that the \$100 million threshold that has been used now for a number of years, regardless of political administration, would suddenly be changed. Not only should it become at least a \$100 million, but it should be adjusted annually for inflation.

The fourth point I would make is that we must ensure that the regulatory impact analysis, along with the incumbent risk assessments and cost-benefit analyses, are not subject to separate judicial review.



The fifth point—now I will get beyond my hands very soon here—but the fifth point is your recommendation in changing or in recommending some changes about the OMB veto authority. We have problems with OMB having the authority to veto a regulation for the simple reason, that Congress has delegated authority to the agency to regulate, not to the White House, or to OMB. And, in fact, when there are problems over complying with either judicial or congressional deadlines, who will be held accountable if OMB has simply not approved a regulation? If OMB is brought in as the alliance authority, this changes enormously the scope of responsibility. Not to mention that OMB does not have the resources to review every single regulation.

The sixth point I would make is there really needs to be some kind of savings clause. I do not imagine that your committee or that Congress is really intending to undermine the intents of other statutes. For example, the Occupational Safety Health Act has very specific prohibitions on when and where to use cost-benefit analysis. In fact, the Clean Air Act, portions of it, have specific provisions in statute. By doing this, the potential, including with the OMB veto authority, is there to undermine the very statutes that Congress has enacted.

Seventh, there is a heavy, heavy tilt toward quantitative estimates in the various panels that we have heard today. There is very little about, not only qualitative estimates, but a heavier emphasis on benefits. One example: There is nothing in the RIA, the regulatory impact analysis, to address the consequences for not regulating. There is no assessment for that.

My penultimate point would be that in light of the fact that much of this becomes judicially reviewable, there are inconsistencies within H.R. 9 that are very important to those of us that monitor the nitty-gritty of government. For example, title VII sets up the least costly or least intrusive approach as a standard. In title III, we have cost effectiveness as a standard.

Another example: In title VII we have benefits outweighing the cost as a standard; in title III we have benefits will justify the costs as a standard. Very, very different. And when we get into a court, what is the standard we are going to really be applying? In light of your earlier comments, Mr. Chairman, regarding intentions not to rush to judgment, these inconsistencies have to be very carefully examined.

I might say as an anecdote—because I am becoming adept at these testimonies, I have gotten so many of these, one day after another—one staffer, not on this committee, told me over the weekend that it was a blitzkrieg, and the reason for this was that they did not want us to get organized. It should not be an “us versus them” issue. This is about how to make government more efficient.

My last point is that the risk assessments that are required as a result of the RIA's of title VII are based on a science that is still in its infancy. There are many concerns about this, not the least of which is that results can be off by orders of magnitudes. As a result, we may not provide the protections in areas that are preventable.

Let me say that with the focus today on economics, it is important to recognize dollar studies. Academic studies, have dem-

onstrated, particularly in the environmental area, that the overall regulatory structure has not, has not, had a significant impact on the economic output or economic growth of this country. It has had an impact on subsectors in terms of jobs and so forth that has been offset by growth in jobs in other areas. I would refer the committee to a study commissioned by the Economic Policy Institute for further research in that area.

I thank you.

Mr. GEKAS. I thank the gentleman.

[The prepared statement of Mr. Bass follows:]

PREPARED STATEMENT OF GARY D. BASS, PH.D., EXECUTIVE  
DIRECTOR, OMB WATCH

My name is Gary Bass and I am executive director of OMB Watch, a nonprofit research and advocacy organization that works to encourage greater civic participation in government decision-making and to promote a more open, responsive, and accountable federal government. We have been monitoring federal regulatory activities since 1983 and have issued a number of reports on the topic. In the past, we have raised concerns pertaining to secrecy and backdoor dealings that do not comport with an open and fair rulemaking process.

Today, we are concerned about a growing anti-regulatory mood that puts public protections second to free market considerations. This anti-regulatory mood is captured by H.R. 9, The Job Creation and Wage Enhancement Act. Accordingly, OMB Watch has been part of a growing coalition, Citizens for Sensible Safeguards, that opposes H.R. 9 and proposals that will seriously harm the ability of federal agencies and Congress to provide protections to all Americans. Attachment A provides an initial list of organizations that are part of the coalition.

We appreciate the opportunity to testify today. We have a number of reservations about Title VII, Regulatory Impact Analyses, of H.R. 9, as well as Title VI, Strengthening Regulatory Flexibility, and Title VIII, Protection Against Federal Regulatory Abuse, on which you have already held hearings. But before I describe our concerns about Title VII, I have some general comments about H.R. 9.

At the heart of the Job Creation and Wage Enhancement Act is a radical proposal to dismantle federal programs and services, undo various public protections and safeguards, and, in general, make it nearly impossible for Congress to enact future protections. When surveyed, the public strongly supports federal protections to ensure consumer health, worker safety, and environmental protections. At the same time, the public strongly supports streamlining the federal government and rolling back burdensome red tape. We believe both can be achieved. But H.R. 9 is little more than an anti-regulatory attack premised on the industry-led view that government regulations thwart competitiveness. There is little consideration for the people who benefit from these protections.

The Job Creation and Wage Enhancement Act, a misleading euphemism at best, is dangerous legislation cloaked in agreeable rhetoric. Under this bill, we would return to the days when powerful, special interests were given backdoor, unaccountable access to shape federal policies, programs, and protections. Federal agencies would be paralyzed with so many analyses to perform that they will no longer be able to issue, implement or enforce federal safeguards. And if the backdoor channels and new agency requirements don't cripple the regulatory process, these special interests will be given additional, new powers to flood the courts with lawsuits. Perhaps the most draconian proposal, however, is the procedural roadblocks created to stop the passage of laws in Congress.

H.R. 9 is extremely technical and is only now starting to draw public attention. In general, the complexity of these proposals makes it difficult for the public to understand the impact of these proposals. But these proposals affect everyday life; they will not seem so abstruse when a neighbor's child dies from food poisoning or unsafe drinking water, a worker is maimed or killed on the job, or citizens are exposed to toxic chemicals released by nearby factories. That, after all, is the agenda — eviscerate, if not eliminate, various laws such as the Community Reinvestment Act, the Occupational Safety and Health Act, the Endangered Species Act, Superfund, the Truth-in-Lending Act, and other laws intended to safeguard Americans.

I do not want to give the wrong impression. The public interest community acknowledges the need for reforming the regulatory process. But the zeal to reduce burdensome red tape must not result in scaling back sensible safeguards. In fact, we have long argued for improving the regulatory process and worked with the Clinton Administration to reform a series of Reagan-era Executive Orders dealing with agency regulations. We continue to push for meaningful regulatory reform, but oppose H.R. 9.

#### Summary of Concerns About Title VII

1. We oppose codification of E.O. 12291. During the 1980s, OMB Watch was a vocal critic of E.O. 12291, as well as other Reagan-era Orders dealing with government regulation, such as E.O. 12498. E.O. 12291 requires agency regulations to be justified in terms of economic costs and benefits as interpreted by the Office of Management and Budget. All executive branch agencies except independent agencies were covered under E.O. 12291. Title VII would include independent agencies.

Under E.O. 12291, agencies must:

- Publish semi-annual agendas of planned regulations and existing rules to be reviewed;
- Assess the general economic costs and benefits of all regulatory proposals and submit all proposed and final rules to OMB;
- Refrain from publishing proposed and final rules until completion of the OMB review; and
- Periodically review existing regulations.



For every "major" rule, the Order required an agency to complete a Regulatory Impact Analysis (RIA) that describes the costs and benefits of the proposed rule and alternative approaches, and justifies the approach chosen. Title VII greatly expands the scope of the RIA (see below).

E.O. 12291 allowed OMB's Office of Information and Regulatory Affairs (OIRA) to operate in secrecy and wield substantive control over agencies. Our research efforts, along with congressional and press investigations, demonstrated that OIRA repeatedly put private, commercial interests ahead of efforts -- even congressionally mandated efforts -- to clean up the environment, to protect worker health and safety, and to enforce consumer protections. Because the Order permitted OMB to operate under a veil of secrecy, it was able to interminably delay agency rulemakings, circumvent legislative and judicial deadlines, and usurp agency decision-making authority while remaining unaccountable to the public and Congress. Lower level civil servants at OIRA with little or no substantive experience in areas they reviewed were able to dictate policy to agency officials.

As greater public attention was put on OMB, the Bush Administration created the Vice President's Council on Competitiveness. The Council acted as a conduit for business to impose its will on the regulatory decisions of government -- further politicizing the process. The activities of the Council forced a number of hearings in Congress, which led to the introduction of several legislative bills to require sunshine in the regulatory review process. It is particularly ironic that Republicans decried the proposed legislative intervention in Presidential executive powers to implement the laws of the land. Rep. David McIntosh, then director of the Council on Competitiveness, led much of the opposition on legislative intrusions. Now, he leads efforts to make such legislative intrusions.

When President Clinton took office he vowed to end the backdoor dealings and promptly disbanded the Council on Competitiveness. On September 30, 1993, he issued Executive Order 12866, "Regulatory Planning and Review," to replace E.O. 12291 and 12498. The Order was designed to restore integrity and accountability to centralized regulatory review. The Order also articulated Clinton Administration's philosophy and principles regarding regulation and provided a comprehensive planning process.

In May, 1994, we testified in the Senate on the implementation of E.O. 12866. Given the history of contentious testimony over E.O. 12291, the hearing was most notable for the lack of controversy over E.O. 12866. Neither the public interest community nor the business community criticized the Order. In fact, the Order seems to have fixed the problems of delay and secrecy.

E.O. 12866 requires notable disclosure procedures that were not part of E.O. 12291. Under the new Order, it is possible for the public to track when rules have been submitted to OMB, to identify non-governmental entities that have contacted OMB regarding a regulation under review, to review actions that OMB has taken on regulations after a regulation has been published in the Federal Register. In fact, much of this information is now available over the Internet, making public accountability that much easier.

This accountability has also verified that delay is no longer a problem, although it happened

with regularity under E.O. 12291. It was not uncommon for controversial regulations to sit at OMB for several years, leading critics to charge that OMB was nothing more than a black hole, swallowing regulations whole.

The cost of delayed regulatory action is significant. Delay can cost lives when important rules are held up, such as chemical plant safety guidelines, where hundreds of lives can be lost in a preventable plant accident. Delay can also disrupt the business planning cycles. The trickle-down effect of this uncertainty can hurt businesses saddled with inventory and can lead to job loss.

E.O. 12866 also made significant improvements over E.O. 12291 by creating a process for more focused and streamlined reviews. Under E.O. 12291, OMB reviewed every agency rule, but under E.O. 12866, OMB focuses on significant rules. Routine rulemakings have been turned back to agencies, allowing OMB to focus its limited resources on the most important rules.

E.O. 12866 attempted to avoid prescriptive, across-the-board requirements by providing general principles that agencies were to employ. These principles acknowledge that one-size-fits-all requirements will not work with agencies that have diverse needs and requirements. Rather, E.O. 12866 attempted to develop an outcome framework that emphasizes sensible regulation.

Given the improvements that E.O. 12866 makes over E.O. 12291, it is a mistake for Congress to codify E.O. 12291. As Thomas Jefferson once wrote: "I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind... We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors." (letter to Samuel Kercheval, 1816) E.O. 12291 is a coat that we have outgrown.

While we strongly oppose codification of E.O. 12291, we think it also would be a mistake to codify E.O. 12866. Two reasons follow. First, the Order is an evolving document and may need slight modifications as time wears on. For example, the Order states that there may be a 30-day extension of a regulatory review (beyond the initial 90-day review period) if the Director of OMB grants written approval and the request is from the agency head. Yet, increasingly, agencies are finding it difficult to go through the chain of agency command in a timely manner in order to get a "sign-off" for the 30-day extension from the agency head. In certain cases, the OIRA desk officer has written a memo to the file indicating that the agency has sought the extension so that the review process can continue. Thus, the request did not formally come from the agency head. This action would be out of compliance with the law if E.O. 12866 were codified.

This is only one example of the need for allowing flexibility in allowing the Executive Branch to fashion its implementation of regulatory review. Others are likely to develop over time. This is not to say that Congress should ignore the regulatory review process. Consistent, diligent congressional oversight is essential. Hearings are needed to better understand what progress the Executive Branch is making in creating a regulatory framework that results in improved government efficiency and makes agencies and regulations more responsive to public need.

If Congress feels it necessary to address the regulatory review process in law, it should develop outcome measures instead of the command-and-control, prescriptive measures as advanced in Title VII. Real mechanisms of reducing regulatory burden should be debated when laws come up for reauthorization. These real mechanisms include using newer information technologies to minimize duplicate reporting, improve cross-agency sharing of information, and streamline reporting processes. The debate over meaningful burden reductions should become a guise for undermining federal safeguards — as is now happening.

Second, each Presidential Administration should have some latitude in articulating regulatory principles and priorities, subject to congressional oversight and consistency with applicable laws. Setting E.O. 12866 (or E.O. 12291) into law will lock out opportunity for future improvements.

2. Title VII adds so much new bureaucracy that agencies will be delayed, if not stopped, from providing public protections. Title VII covers all "major" rules, but greatly expands the definition to cover virtually all government regulations. Under E.O. 12291, agencies were required to conduct a Regulatory Impact Analysis (RIA) for each "major" rule. A "major" rule is any rule that will have an economic impact of \$100 million or more, or any rule that OMB says is major. Title VII expands the definition to also include any rule that:

- Affects 100 people or more; or
- Will cost an entity at least \$1 million to comply with it. No time frame is placed on the expenditure criteria.

We strongly oppose this new definition of "major" regulation. Regardless of political party each Administration has set the definition at the \$100 million level. We strongly urge Congress, if it must legislate in this area, to adopt a similar standard. Additionally, the figure should be annually adjusted for inflation.

The Reagan-era RIA contained two major elements:

- Descriptions of the potential costs and benefits of the rule, including effects that cannot be quantified in monetary terms, and who the beneficiaries and losers will be; and
- A discussion of alternative approaches that could achieve the same regulatory objectives at lower costs, along with an explanation of any legal reason for not adopting the less costly approach.

Title VII, on the other hand, requires agencies to include 23 elements. These include descriptions and statements regarding, among other things:

- The necessity and appropriateness of the rule;
- How the proposed rule will address the problem;
- A description of alternative approaches considered by the agency or suggested by others and the reasons they were rejected;
- A quantification of the risks to human health or environment (but not safety);



- An estimate of the economic costs of the rules, including compliance costs;
- An evaluation of costs versus benefits and how those benefits outweigh the costs;
- A "demonstration" that the rule provides the least costly or least intrusive approach for meeting the intended purpose;
- An estimate of the paperwork burdens imposed on the regulated community;
- Whether the agency can be reasonably expected to implement the rule with the current level of appropriations; and
- The public may submit comments on the RIA to OMB.

Title VII greatly expands the scope of Title III, Risk Assessment and Cost/Benefit Analysis for New Regulations. Title III requires risk assessments and cost-benefit analyses (and describes how they should be done) for "major" rules -- defined as having an annual economic effect of \$25 million or more -- affecting human health, safety, and the environment. Title VII indicates that its requirements are to be consistent with the requirements of Title III, but has a much broader definition of "major" regulation.

Thus, any regulation dealing with human health and environment affecting 100 people or more, or costing an entity \$1 million or more, will also need to comply with the risk assessment requirements in Title III. Similarly, any regulation (not just health and environment) affecting 100 people or more, or costing an entity \$1 million or more, will also need to follow the cost-benefit requirements of Title III. EPA, alone, has stated that it would cost \$100 million per year to comply with the requirements of Titles III and VII.

EPA's calculations did not consider the fact that Title VII will also influence the peer review panel requirements in Title III. Title III states that the scientific and economic information for risk assessments and cost-benefit analyses of "major" rules having an annual economic impact of \$100 million or more must be peer reviewed. Title III also requires peer reviews for "any major risk assessment or cost assessment that may have a significant impact on public policy decisions." Since Title VII expands the scope of what is considered a significant impact, agencies are likely to have to do many more peer reviews than anticipated.

In addition to the RIA requirements, Title VI alters the Regulatory Flexibility Act so that in determining whether a rule has a "significant" impact on small entities, the agency is to consider the "direct and indirect effects" of the rule. There is no definition of what is to be included in such an analysis. In addition, the agency is to assess the monetary costs of the rule on small entities.

Adding in these requirements will require significant agency resources and take a lot more time to do. EPA, for instance, has estimated that the current average development time for rules of approximately 36 months (18 months for proposal and 18 months for promulgation) would jump significantly. For rules with an annual economic impact of \$100 million it would take an additional 7-16 months; for those with an annual economic impact of \$25 million, it would take an additional 10-27 months; and for those with an annual economic impact of \$1 million, it would take an additional 3-12 months. EPA has also estimated that it will cost them \$220 million per year to comply with Titles VII and III, up from its current expenditure of \$120 million.

Many underlying statutes already provide prescriptive responsibilities to conduct economic analyses. Some these may add additional requirements on top of the RIA requirements.

Given the House has just passed an amendment to the U.S. Constitution requiring a balanced budget, there are serious questions as to whether Congress will be able to provide the resources needed to carry out the requirements of H.R. 9. Without carrying out the requirements of H.R. 9, the agency may not proceed with rulemaking. In the end, it is the public that is hurt, as agencies are so tied up that they cannot complete the regulations needed to enforce the laws.

We strongly oppose the added bureaucracy imposed on agencies by H.R. 9.

**3. The Regulatory Impact Analysis, including risk assessments and cost-benefit analyses, should not be subject to separate judicial review.** The bill should clearly indicate that any regulatory analysis required shall not be subject to judicial consideration separate from review of the rule to which it relates. If an agency's action on a final rule is challenged under the Administrative Procedure Act, the whole rulemaking record, including agency analyses, is subject to judicial review and will be considered in determining the legality of the rule.

Similarly, Title III should be clear that the development, issuance, and publication of risk assessment and risk characterization guidelines are not subject to judicial review. Additionally, the agency's determination of whether a rule is "major" -- and, hence, required to follow the procedures of Titles III and VII -- should not be subject to judicial review.

Without the judicial prohibition, H.R. 9 creates an opportunity for judicial overkill. Even if the agency is able to slog through all the analytic hurdles, a regulated entity can tie up the agency in the courts for a considerable amount of time.

**4. Title VII should not give OMB final approval authority over agency rules.** Title VII states that an agency may not issue a regulation unless OMB approves it in writing. Given that Title VII affects virtually every government regulation, this will deluge OMB. This runs counter to the recent efforts to make better use of scarce OMB resources by focusing on the most significant regulations. Perhaps more importantly, this usurps the delegation vested in agencies by Congress.

This provision goes significantly beyond E.O. 12291. Under the Reagan Order, OMB could determine the consistency with the Administration's policies and priorities, request additional information from the agency, or simply delay review. In effect, it had veto power, but never had the actual authority to approve or disapprove the agency's regulatory actions. In part, the Reagan Justice Department lawyers were concerned about the displacement of agency authority as granted by Congress. For example, a law may require an agency to issue a specific regulation by a specific date. But if the OMB does not approve the RIA, then the agency cannot comply with the law. Who, then, is really in charge, the agency or OMB? The same issue occurs with court imposed deadlines.

Section 7005 should be deleted.

5. Title VII needs a savings clause to insure that the requirements do not undermine the intent of other statutes. For example, the Occupational Safety and Health Act and portions of the Clean Air Act put prohibitions on cost-benefit analysis. Yet this would be required by Title VII and subject to OMB approval. Thus, if OMB is dissatisfied with the cost-benefit analysis, the rule could be disapproved, violating the intent of the underlying statute. H.R. 9 should not be permitted to undermine the requirements of publicly debated and approved laws.

6. The RIA requirements are heavily tilted to quantitative, cost estimates, leaving out qualitative beneficial assessments. In many respects the regulatory process is more an art than a science. It is an attempt to balance the needs of the public with those of regulated entities. Unfortunately, this often translates into public protections versus burdens imposed on business. At times, the government has tilted too much in one direction or another.

Regardless of your perspective, it is important to note that there is no magic bullet that will automatically balance these two interests -- not RIAs, not risk assessments, and not cost-benefit analyses. At best, risk assessment and cost-benefit analysis are economic tools that agencies should use in developing decisions about when and how to regulate, but should not be the sole or main criteria when dealing with social regulation. After all, the bottom line remains: how much is a human life worth?

In fact, Title VII places a much too heavy emphasis on the cost side of the equation and imply that benefits are to be quantified. There are qualitative factors that often times are of paramount importance, issues pertaining to equity and distributional impacts. These qualitative assessments must be an equal part of the equation.

There are also important questions not asked in the RIA. For example, what is the cost to society of not regulating. Title VII lacks any discussion about the importance of regulation and should incorporate a more balanced approach.

Overall, H.R. 9 places far too much faith in a belief that economic models can impartially determine what needs regulating. This is a false belief. In many cases these economic models cannot properly be relied on to evaluate the need to regulate. Unfortunately, H.R. 9 moves risk assessment and cost-benefit analysis as threshold criteria in determining whether to regulate instead of serving as a tool for agency use.

7. The requirements of Title VII are inconsistent with Title III and create enormous confusion as to the criteria for regulating. Title VII sets up different criteria than Title III for deciding whether to regulate. For example, Title VII requires the agency to demonstrate "that the rule provides the least costly or least intrusive approach for meeting its intended purpose." But Title III Section 3201(a)(5)(D) establishes cost-effectiveness as the criteria, not least costly or least intrusive. Similarly, Title VII requires an "evaluation of how those benefits outweigh the cost." Yet Title III Section 3201(a)(5)(C) requires certification that the benefits "will justify the costs," a significantly different criteria than benefits outweighing costs.

8. The science of risk assessment, which is required by the RIA, is still in its infancy and has many methodological flaws. Unfortunately, risk assessment still is a science in its infancy. There are many methodological problems that can result in conclusions being wrong by several orders of magnitude. Thus, following wrong conclusions, we may make decisions not to regulate when deaths and disease could be preventable. Some methodological problems include: (a) lack of data about exposure, especially at low doses; (b) assumptions about pathways for exposure that can, at times, be incorrect; and (c) averaging techniques that miss impact on sensitive and over-exposed populations. This last point is nothing less than a civil rights issue.



**Citizens for Sensible Safeguards**

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Public protections, such as those dealing with food safety, safe drinking water, worker health and safety, equal educational opportunity, civil rights, toxic pollution, the well-being of children, and health care, are under attack through Congressional initiatives to reduce or eliminate federal laws and regulations. The following organizations believe the federal government has an important role in protecting the public interest and in improving quality of life. We believe that undermining federal safeguards will cause serious harm to citizens. These Congressional initiatives also jeopardize services provided by public charities and religious and governmental entities valued by our society.

Buried in the *Contract with America's* fine-sounding rhetoric about shrinking government and rolling back red tape is a plan to undo laws and safeguards that citizens have struggled long and hard to champion. We strongly support improving laws and safeguards that protect citizens while recognizing the need to reduce unnecessary red tape. The zeal to minimize regulatory burdens must be balanced with the need to ensure protections for all Americans. Accordingly, we oppose actions taken by Congress to undermine sensible safeguards.

We urge President Clinton and Congress not to let the popular cry of cutting red tape -- something we all believe in -- become a guise for dismantling federal safeguards that should be preserved.

**Signers**

20/20 Vision  
 Action on Smoking and Health  
 AFL-CIO  
 AFL-CIO, Public Employee Department  
 AFL-CIO, The Food and Allied Service/Trades Department  
 AIDS Action Council  
 Alabama Conservancy  
 Alliance for Justice  
 Alliance to End Childhood Lead Poisoning  
 Amalgamated Clothing and Textile Workers Union  
 Amalgamated Transit Union  
 American Academy of Child and Adolescent Psychiatry  
 American Association of Children's Residential Centers  
 American Association of People with AIDS  
 American Association of University Affiliated Programs for Persons with Developmental Disabilities  
 American Association of University Professors  
 American Association of University Women  
 American Association on Mental Retardation

American Civil Liberties Union  
 American Council for the Blind  
 American Federation of State, County, and Municipal Employees  
 American Lung Association  
 American Network of Community Options and Resources  
 American Oceans Campaign  
 American Occupation Therapy Association  
 American Public Health Association  
 American Speech-Language-Hearing Association  
 Americans for Democratic Action, Inc.  
 Association of Maternal and Child Health Programs  
 Atlantic States Legal Foundation  
 Bazelon Center for Mental Health Law  
 Center for Advancement of Public Policy  
 Center for Community Change  
 Center for Marine Conservation  
 Center for Media Education  
 Center for Science in the Public Interest  
 Center on Disability and Health  
 Children's Defense Fund  
 Child Welfare League of America  
 Church Center for Sustainable Community  
 Citizen Action  
 Clean Water Action  
 Clearinghouse on Environmental Advocacy and Research  
 Coalition on Human Needs  
 Coast Alliance  
 Colorado Rivers Alliance  
 Community Nutrition Institute  
 Consumer Federation of America  
 Cornucopia Network of New Jersey  
 Council for Exceptional Children  
 Defenders of the Wildlife  
 Ecology Task Force  
 Environmental Action Fund  
 Environmental Defense Fund  
 Environmental Research Foundation  
 Environmental Working Group  
 Epilepsy Foundation of America  
 Families USA  
 Family Service America  
 Food Research and Action Center  
 Friends of the Earth  
 Hamlet Response Coalition  
 Harmarville Rehabilitation Center  
 Health and Development Policy Project  
 Helen Keller National Center  
 Humane Society of the United States  
 Inter/National Association of Business, Industry and Rehabilitation  
 International Association of Fire Fighters  
 International Brotherhood of Teamsters

International Ladies' Garment Workers' Union  
 International Union of Electronic, Electrical, Salined, Machine, and Furniture Workers  
 Izaak Walton League of America  
 Justice for All  
 Kentucky Waterways Alliance  
 League of Women Voters of the U.S.  
 Learning Disabilities Association  
 Mineral Policy Center  
 National Association for the Advancement of Colored People  
 National Association of Developmental Disabilities Councils  
 National Association of Protection and Advocacy Systems  
 National Association of School Psychologists  
 National Association of Social Workers  
 National Association of the Deaf  
 National Association of Vocational Assessment and Education  
 National Audobon Society  
 National Campaign for Pesticide Policy Reform  
 National Center for Learning Disabilities  
 National Coalition for the Homeless  
 National Coalition on Deaf-Blindness  
 National Consumers League  
 National Council of Jewish Women  
 National Council of La Raza  
 National Council of Senior Citizens  
 National Council on Family Relations  
 National Education Association  
 National Family Farm Coalition  
 National Head Injury Foundation  
 National Health Care for the Homeless Council  
 National Low Income Housing Coalition  
 National Parks and Conservation Association  
 National Recreation and Park Association  
 National Therapeutic Recreation Society  
 National Women's Law Center  
 Natural Resources Defense Council  
 Neighbor to Neighbor  
 NETWORK: A National Catholic Social Justice Lobby  
 Network for Environmental and Economic Responsibility/United Church of Christ  
 New York Committee for Occupational Safety and Health  
 North Carolina Occupational Safety and Health Project  
 Nuclear Information and Resource Service  
 Oil, Chemical & Atomic Workers International Union  
 OMB Watch  
 Pacific Rivers Council  
 Paralyzed Veterans of America  
 Philaposh  
 Physicians for Social Responsibility  
 Protestant Health Alliance  
 Public Citizen  
 Public Voice for Food and Health Policy  
 River Network



Rivers Council of Washington  
 Safefood Coalition  
 Scenic America  
 Service Employee's International Union  
 Sierra Club Legal Defense Fund  
 Southern Utah Wilderness Alliance  
 Spina Bifida Association of America  
 S.T.O.P. -- Safe Tables Our Priority  
 Telecommunications for the Deaf, Inc.  
 The Arc  
 The Wilderness Society  
 Trout Unlimited  
 Union of American Hebrew Congregations  
 Union of Concerned Scientists  
 United Auto Workers  
 United Brotherhood of Carpenters and Joiners of America, AFL-CIO  
 United Cerebral Palsy Associations  
 United Church for Christ, Office for Church in Society  
 United Methodist Board of Church and Society  
 United Mineworkers Union  
 United Steelworkers of America  
 US PIRG  
 Vocational Evaluation and Work Adjustment Association  
 Western Massachusetts Coalition for Occupational Safety & Health  
 Western New York Council on Occupational Safety and Health  
 Women of Reform Judaism, The Federation of Temple Sisterhoods  
 Women's Legal Defense Fund  
 Women's National Democratic Club  
 Women Work! The National Network for Women's Employment

Mr. GEKAS. Mr. Freeman.

**STATEMENT OF GEORGE CLEMON FREEMAN, JR., ESQ.,  
COCHAIR, AMERICAN BAR ASSOCIATION'S WORKING GROUP  
ON REGULATORY REFORM, ON BEHALF OF THE ABA**

Mr. FREEMAN. Mr. Chairman, my name is George Freeman. I am here for the American Bar Association, and with me is my cochair, Philip Harter. We are here as the cochairs of the Working Group on Regulatory Forum of the American Bar Association and speak for it and we ask our written testimony be made part of the record.

Mr. GEKAS. Without objection, it will be accepted for the record.

Mr. FREEMAN. I would like to make a few comments today from two perspectives. One, having sat through all of the testimony here today and having heard similar kinds of testimony for the last 15 years—I happen to be one of the members of the old ABA regulatory reform group that in 1982 helped give you S. 1080, which I remind you, gentlemen, dealt comprehensively with regulatory reform and was enacted by the Senate by the overwhelming majority of 94 to 0 with bipartisan support. That legislation had overwhelming support in this House and the reason it is not law today was because the Speaker was opposed to it and it never came to a vote. That left regulatory reform half completed. The executive department had done its duty through the Reagan Executive order. We all applauded. But Congress failed to do its duty to give further guidance to the agencies, both in the executive department and the independent agencies, on how to use the legislative power which Congress has delegated to them under these various acts that we are talking about here.

S. 1080 would have exercised that power in two ways: First, you would have mandated through the statute itself not by reference to the Executive order that was freestanding and the President doing his duty. Doing your duty you would have given these agencies a specific command to do regulatory analysis, to take cost benefits into consideration, and you would have told them how to make decisions under the organic statutes which you have given the agencies.

Second, you would have mandated wide-sweeping and needed changes in the Administrative Procedure Act to impose additional duties on agencies and to give persons involved in rulemaking, whether as beneficiaries of the proposed rule or as the persons who are going to bear the economic incidence of those proposed rules, greater rights beyond the bare bones notice and comment procedures provided for in informal rulemaking under the APA as it presently exists.

When the Executive order was framed and issued by President Reagan, those amendments to the Administrative Procedure Act were on the table. Therefore, the provisions in that order presupposed that those additional procedural constraints would be imposed by you under your law, exercising your oversight authority. And one of the reasons why we have had these instances of agencies evading the Executive order that Boyden and Jim talked about in the preceding panel—agencies in the Reagan administration, in the Bush administration, and in the Clinton administration, failing to go along and do the right thing on regulatory reform, was the

absence of those procedural requirements which should have been written into the APA.

One of the reasons for the demand for judicial review that is here today is that it is another way of imposing those kind of constraints.

Based on this, and on the experience Phil and I and the members of our working group have had in following this for the last 15 years, we have the following suggestions to make to you on a practical course for today.

Let us take what ought to be in the substantive commands you give the agencies. Why do you not just take as a starting point what was in S. 1080, what was in the Reagan Executive order, and what is now in the Clinton Executive order. We made a comparison of the two orders and found that while the \$100 million is the same, I urge you, do not get hung up over that number, keep it 100 million or make it 90 or make it 50, but the point Boyden was making is very important. It is just not that number that is in those two orders. There are substantive criteria that provide a safety valve. They say, all right, if it is not a 100 million if the proposed rule is going to affect prices to consumers, it is a major rule. That was a specific criteria in the Reagan order that got taken out in the Clinton order. Why was it taken out? It was omission probably inadvertent. But let us ask them. If they say it was inadvertent that they did not mean to not consider cost to consumers, put it back in your statute. Do the same thing in adding competitive effects. That was also left out in this reissuance of the Executive order.

There are also some good new things that broaden the scope of a major rule in the Clinton order. Pick them up, too. Let us make them a part of the bill. Take up where she says she is coming from and sit down and write these provisions into the statute.

Now, if you write these added criteria into the statute, you then have to deal with the problem of judicial review. And I agree with Boyden that the important point of judicial review is not so much enforcing the procedural requirement as it is enforcing the substantive requirement. And what are the substantive requirements?

First, the agency is supposed to do a cost-benefit analysis for the record. And in that record it is supposed to make its decision on the basis of that cost-benefit analysis unless the statute prohibits it from doing that, in which case it is still supposed to do the analysis and tell you that the best alternative is prohibited and here are the consequences of that so you can change the statute if you need to.

Be that as it may, the way the old S. 1080 would have worked, it would have made that analysis part of the record for judicial review. It would have mandated public access to it. It would have mandated the analysis be made before the rule is proposed or while it is being proposed. And it would have made statement of basis and purpose for the final rule address it and all the alternatives to it that were proposed in that rulemaking. And then it gave the court new standards of review though the so-called revised Bumpers amendment which said that if there are factual findings on which the rule is based there must be substantial support in the rulemaking file for those findings. That gives somebody appealing



the rule a real right to judicial review. It also made it clear that the agency's interpretation of the statute was not to be deferred to automatically.

Now, since then we have had the *Chevron* case. And the *Chevron* case has meant many things to many people. In the D.C. circuit, the *Chevron* case has been applied in such a way as to, in effect, carry into effect the intent of Congress through the Bumpers amendment on jurisdiction and authority and interpretation of the statute. It really requires the court to still make the hard legal decision and to take a hard look at the facts in the record.

Now, you can handle this one of two ways. You can write specific provisions that address what we call the antievasion problem. The the antievasion problem is the agency evading the command of this statute in one of two ways: One, it cheats on the findings of fact. Well, if it has had to make a record and if there has to be substantial support in the rulemaking record and the court has to look it over, that is an assurance that it will not get away with the cheating.

The other thing, and more difficult and insidious thing, is this practice that has been going on forever of informal guidance. And informal guidance has used the exemption in section 553 of the Administrative Procedure Act for informal policy statements or rules of internal application. And for years many agencies have avoided the notice and comment requirements of general rulemaking by saying they are not issuing new rules, they are just issuing guidance.

Now, S. 1080 would have cured that generically by amending the Administrative Procedure Act to say that that exception did not apply where the statement, whatever label the agency put on it, was in fact a rule. And what is a rule? S. 1080 would have said what the best of the then judicial court decisions, said. That is we do not care what label you put on the statement, if it affects substantive rights of individuals, or imposes new duties on them, it is a rule.

Now that is the way S. 1080 would have solved that problem. You can solve it in a different way here. The Dole bill that has just been introduced in the Senate tries to address it a different way.

My point to you is, though, that there are a lot of things that you are trying to solve here that were solved to the best judgment of the best people in this country 10 years ago by S. 1080. Use it as a starting point.

Now, since then, as I say, new problems have arisen. Risk analysis is much more important today than it was 10 or 12 years ago. We did not know as much about risk analysis then. We have not had as much experience with it as we have with cost-benefit. You can write confidently, based on the experience of five or six administrations with doing cost-benefit analysis that go back to the passage of NEPA in 1969, on how to do cost-benefit analysis.

On risk assessment, you may have to be more cautious and careful. Following the precedent of NEPA and following our experience with cost-benefit analysis, you may need to be more general and do not dictate exactly how, to do it. Say you have to consider risk analysis and more important you have to articulate what you are doing about it.

Now, those are the new kind of problems. There you can be more cautious. But you can still go forward. You can solve those problems now. You can report out a bill in 60 or 90 days that represents the best of all the accumulated old wisdom and takes into consideration the changing times of the last 12 years. You can strike a major blow for freedom. And I think, based on the process we had going then and based on the promise that Ms. Katzen gave us here today, you might could do this and end up with a bipartisan bill that would start out with where we started all together with the unanimous support of virtually everybody a little more than a decade ago.

So that is an awful lot to say in a brief period, but I do think it is an approach you ought to follow.

Mr. GEKAS. We thank you, Mr. Freeman.

[The prepared statement of Messrs. Freeman and Harter follows:]

PREPARED STATEMENT OF GEORGE CLEMON FREEMAN, JR., AND PHILIP J. HARTER, COCHAIRS, AMERICAN BAR ASSOCIATION'S WORKING GROUP ON REGULATORY REFORM, ON BEHALF OF THE ABA

On the general subject of regulatory reform at the federal level, the American Bar Association remains committed to the general principles reflected in Executive Order 12291 of February 17, 1981 and in S. 1080, as it passed the Senate 94 to 0 in 1982, though the translation of these principles into statutory language needs to be reexamined to adapt to the realities of today's administrative law practices.

These principles are:

Regulatory analysis should be required by statute and should apply to promulgation of all new major rules by executive branch agencies and the so-called independent agencies.

Regulatory analysis should include cost/benefit and cost effective evaluation of the proposed major rule and alternatives to it.

Unless expressly prohibited by the language of the agency's organic statute, the alternative adopted should be the one that produces the greatest net social benefit.

Regulatory analysis, including all comments from within the government and by the public, should be part of the record for judicial review of the final rule.

Decisions on whether a proposed rule is "major" should be subject to judicial review.

The Administrative Procedure Act (APA), and any other federal statute that includes an exemption from some or all of the provisions of the APA and substitutes its own procedural requirements, should be amended or supplemented to resolve long standing basic procedural problems involving agency rulemakings. Some were addressed by amendments proposed in S. 1080 and new problems that have arisen since 1982 that adversely affect public participation in rulemaking or thwart meaningful judicial review.

Translating these principles into application to the bill before you today, H.R. 9, we offer these comments:

1. As a general proposition, we support using concepts reflected in S. 1080 and Executive Order 12291 for (a) defining a major rule, (b) prescribing the contents of a cost-benefits analyses and (c) providing for a cost-benefit based decision with regard to the selection of the final rule. We believe specific requirements should be written into the statute rather than by referencing either of these two sources by cross reference.

2. In H.R. 9, Title III, Risk Assessment and Cost/Benefit Analysis for New Regulations, and Title VII, Regulatory Impact Analysis, substantially overlap. For this reason they need to be considered together and coordinated. As between the two separate approaches taken, we believe the Title III approach is preferable to the Title VII approach. Even so, the "certification approach" has the danger of being viewed as only changing procedural, not substantive standards. On this point, we note that S. 343, which was introduced on February 2, 1995, addresses many of the same issues addressed in Title III and Title VII of H.R. 10. Its basic approach and language on the costs benefits decisional criteria is much closer to S. 1080 and the Reagan Executive Order. It also provides

for judicial review of decisions on the classification of rules as major or non-major and also contains a standard for judicial review of agency interpretations of statutes that reinforces the "hard look" approach. We are in favor of both.

3. The Association supports the basic thrust of Sections 7002 and 7004 of H.R. 9 to mandate by statute the preparation of a regulatory impact analysis of all proposed new major rules.

4. We believe that there is a point at which expanding coverage for review could prove to be counter productive by diverting limited agency resources into areas where the potential social benefits of the analysis, and decisions based on it, would be by definition, less.

5. We believe that the President has constitutional oversight authority to see that federal agencies comply with all statutory requirements. Section 7005 goes beyond this by providing that an agency may not adopt a major rule unless the Director of the Office of Management has approved the final Regulatory Impact Analysis for the rule. We believe that this goes too far. It also raises substantial Constitutional problems involving separation of powers and the President's duty to see that the laws are faithfully executed. We urge its deletion and the substitution for Section 7005, and its companion Section 7006 which, however well intentioned, goes too far into micro-management, of a more general executive branch oversight provision along the lines proposed in S. 343.

6. As a general proposition, the Association supports greater procedural rights to participants in rulemaking. We believe that, as in S. 1080, that is better undertaken though a series of general amendments to the Administration Procedure Act, and through conforming amendments to other federal statutes that exempt specified federal agencies from some or all of the APA requirements and provide equivalent or parallel procedures for rulemaking. Most of these issues are not, however, before you today. They may be addressed on a separate track or through other legislative approaches. They are, however, worthy of your future consideration because they are directly relevant to overall improvement of the rulemaking process.

In conclusion, the Association stands ready to assist the Committee and its staff in any way as you move forward to consider H.R.9 and related proposals for regulatory reform.

Mr. GEKAS. I start off by saying to you, and to Ms. Rogers, that you were saying something similar in both your testimonies and I wanted to start off by assuring both of you that I, for one, want to incorporate the best features of all that has been done in the last 10 years. For instance, I am not one who endorses simply incorporating by reference the Reagan directive and making that our law. I want to take the best portion of it and whatever other precedents that we have already established to form our own language.

We have been discussing that regularly. I am not going to personally try to convince my colleagues that we just simply will lift the Reagan order and make it the law. I do not want to do that. So we will look at the Senate bill, S. 1080, of that era, and the Reagan and the Clinton directives and go from there. So two of my questions or assertions were made for both of you there.

Mr. Harter, did you want to add anything?

Mr. HARTER. No, thank you very much.

Mr. GEKAS. That is good.

Mr. BASS. Mr. Chairman, just for the record, while we oppose codification of Executive orders, we do not oppose working with you on finding a framework by which Congress can assert itself on a regulatory matter.

Mr. GEKAS. All right. We thank you for that.

Mr. FREEMAN. I would add all of us would be in agreement on this panel that all the information that is generated in this process should be made public and should be part of the record for judicial review and it should affect the decisionmaking. That is the whole purpose of it.



Mr. GEKAS. We need you to help write this thing, Mr. Freeman.

Mr. FREEMAN. Mr. Harter, and I are available day and night.

Mr. GEKAS. Well, we are starting at 5:30, if you want.

Mr. REED. We are late.

Mr. GEKAS. Oh my gosh, it is after 5:30.

I have one more assertion or question or request for comment. Mr. Bass rocked me when he said that 36 months is the time now required for a promulgation of a regulation by EPA.

Mr. BASS. That includes both proposed and final rules, that is correct. It is the full life cycle, according to EPA. The average.

Mr. GEKAS. You mean, for my entire incumbency in Congress, we have had three regulations imposed by the EPA?

Mr. BASS. That's the average time. This is due in part because they are already, under requirements required, to do many of the risk assessments and cost-benefit analyses, as well as, due the Executive orders, regulatory impact analyses. So a fair amount of research and analysis already does go on.

Mr. FREEMAN. But that is part of a broader problem that some of the earlier witnesses referred to earlier. And that is that often Congress likes to look good, and so whenever we have the latest series of Clean Air or Clean Water Act amendments, we impose all these statutory deadlines which cannot possibly be complied with in the real world, and are not. What happens under the existing process is when the statutory deadline is passed, usually some public interest group—I don't mean that to be invidious—comes in and says, hey, Mr. Court of Appeals for the District of Columbia, EPA has missed its deadline. They bring the agency into court and say, it is in default under the law and let us have a consent decree. Why don't you give them, let's say, 9 months more past the deadline. So the court, being reasonable, says, all right, I will give the agency a deadline. And then a lot of times the group comes back and says to the agency, I know you need all this information, but you are under this court deadline and you better meet it. Fortunately, the court, as a general matter, will tell the agency, take the time you need to come up with a realistic rule. But there is a tension there. There is a tendency to do the second best in order to meet the judicially extended statutory deadline.

Some of the bills that are proposed would address that by creating a hiatus for whatever additional time was needed to do the kinds of analysis mandated for major rules, however you define them, that you dictate in the legislation. We urge you to consider that because providing for extensions is an important problem.

There is an additional problem out there where courts have already entered such decrees and the rulemakings are still in progress. Those rulemakings may or may not be caught by your changes throughout this legislation. If so, you need to address those court decrees, too, to give the agency proper time to do what you tell it to do.

Mr. GEKAS. At the moment, I have no further questions. I will yield to the gentleman from Rhode Island.

Mr. BASS. Mr. Chairman, if I could add to your comment about the 36-month period being startling.

I think we all want to streamline the system as best we can. When rules come out that are intended to provide protections and

safeguards, no one wants to wait until a life or the environment or any particular issue is at stake. I do not think business wants that either. Regulations can help the life cycle of a business, for that matter.

So I think that the objective should be to try to find the most efficient process while respecting the various perspectives that come to bear. And the Administrative Procedure Act was set up to provide for much of that old S. 1080 would have expressly addressed this matter and created an exception for these emergency rules where you did have life and death or serious problems. And you did the best you could with what you could do, but you still had to go ahead afterward and do the appropriate analysis so that you could come back and fine-tune what you put in place.

And, again, that is the problem that people thought about, focused on and were unanimous in coming up with a solution for 12 years ago.

Mr. GEKAS. Gentleman from Rhode Island.

Mr. REED. Thank you, Mr. Chairman.

Mr. Freeman, in your testimony you raise some questions about section 7005, the OMB review.

Mr. FREEMAN. Yes, sir.

Mr. REED. Can I assume in your testimony that you would not be discomfited if that whole section was taken out?

Mr. FREEMAN. We think that goes too far. We are all for Presidential oversight. We think it was properly addressed in the Reagan Executive order. We think it is also addressed, in somewhat but not quite the detail, in the Clinton order. We think that the choice of who is to oversee the agencies really ought to be left to the President because it is his constitutional responsibility to see that the laws are faithfully executed.

Mr. REED. But the chairman has suggested changing it around, making it—you would be comfortable and other panelists might be comfortable, too, with simply deleting it.

Mr. FREEMAN. Based on our analysis of it—you must remember that our ABA working group was just reconstituted and reorganized here the last 2 or 3 weeks and we have a lot of proposals here; we do have a lot of ancestral memories and very good records—we thought about it very carefully 10 to 12 years ago and we did not think it proper and appropriate for Congress to pick out who on the President's staff, he should delegate power to exercise this kind of a veto. We think you ought to leave it to him and though you can say he should articulate what he does or does not do.

But, again, like Boyden says, the President represents everybody. He is the only person elected in our whole system to do that. He is supposed to look at the world. And we should not impose judicial oversight on what he does or did not do in running his own shop. I think the most important thing for you to do is to exercise your authority, your responsibility, and you tell these agencies how to use the power you have given them.

The President has authority over them, but the policy comes from you and the procedures come from you. You have the ultimate decision in our Government on what the policy ought to be and how it ought to be implemented. You should not leave it all up to the

President. It is wonderful to have him in there pitching, too, but you have the main responsibility.

Mr. GEKAS. You are making me proud to be a Member.

Mr. FREEMAN. You ought to be. And you are, I am sure.

Mr. BASS. I would just add that if you cannot delete that section, which I wholly recommend that you do, it would strike me that all the OMB actions must also be judicially reviewable, which has been a notorious problem.

Mr. REED. Let me follow up on that. Professor Gellhorn talked about the standard review. The timing of review is another critical issue.

Could I also assume that the panel would be unanimous or near unanimous that the review should not be a preliminary thing; that it should be when the final rule is promulgated, and that the legislation should be amended if it is not so stated today, to clearly reflect that? Is that a fair comment? Mr. Bass. Anyone, please?

Mr. FREEMAN. I will let him go first because I have been going too first and too fast.

Mr. REED. Mr. Bass.

Mr. BASS. I think the biggest concern that I have is how many bites of the apple occur under H.R. 9. You have an amendment to the Paperwork Reduction Act which, in essence, allows for review of a regulation by looking at the information collection request. You have the review of the IRA. You have another potential review under a possible takings analysis, which the executive branch has an Executive order on. You have too many bites of the apple that are going on here.

It makes much more sense, as you are suggesting, Congressman, to bring together a more efficient review process.

Mr. REED. Mr. Freeman.

Mr. FREEMAN. Again, this is another problem we discussed at great length—we, I mean, the great thing about S. 1080 is everybody participated in it. And the solution which came up in S. 1080 in 1982 was to say that the agency—this was part of a broader reform—under certain circumstance was supposed to give people in these rulemakings the right to limited cross-examination on critical facts. S. 1080 also said the agency was supposed to give them the right to an oral hearing, whatever that means. S. 1080 had a lot of other things in it, too, but one of them was the right indirectly to regulatory analysis.

Now, on appeal, you could appeal the failure of the agency to follow these procedural requirements if you could show that the agency's failure to do so undercut the principal underlying basis for the rule. So if you did that here, you would give citizens a meaningful right to second-guess the agency on whether this is a major rule or not under the statutory criteria.

S. 1080 would have required you have to have a statement of basis and purpose, and to have findings, and then, finally, all the analysis was integrated.

So if you provide us all the procedures S. 1080 would have required, you do not need this piecemeal approach. But if, however, you do not have the other safety procedures in place, you leave an opportunity for the agency to evade compliance with your command because it never lets the regulatory analysis evidence in.



Mr. REED. I think we all sense we would like one shot at the problem and if you could help us come up with language that would do that, and I guess we could go back to S. 1080, I guess, which is the—

Mr. FREEMAN. Well, I am sure it could be polished up.

Mr. REED. Thank you, Mr. Freeman.

One quick final point. Professor Gellhorn suggested it is a good thing to include all the independent agencies, which I suppose would be the SEC, et cetera. We have received comments that they would feel constrained by that because of their adversarial relationship.

But I am wondering, again, if there is near unanimity about including all independent agencies like the SEC, et cetera? Is that—a nodding of the head is sufficient.

Ms. ROGERS. I would say, a lot of the regulatory activities take place in these independent regulatory agencies, and if ultimately the concern is with accountability and the impact on the public, I think we really do have to consider enhancing the accountability as far as independent regulatory agencies go.

Mr. REED. Thank you very much. Thank you, Mr. Chairman, unless Mr. Bass has a quick point.

Mr. BASS. We do not have a firm position on independent agencies, but I must say there is a need, if you move in that direction, to make it consistent with the Paperwork Reduction Act, which provides for an override of an OMB action, so some consistency needs to be brought to bear.

Mr. FREEMAN. The ABA is on record as supporting the application of all this to independent agencies, and Phil Harter was just telling me in the Carter administration, when this was all being discussed, that administration wanted to include them. In the early days of the Reagan administration there was thought of trying to include them in the coverage of the Executive order, but that the resistance to inclusion came from congressional committees with oversight over those independent agencies.

Mr. REED. Thank you very much.

Mr. GEKAS. Does the gentleman from Georgia seek recognition?

Mr. BARR. Thank you, Mr. Chairman.

Mr. Chairman, I would like to commend this panel, I think particularly in some of the questions and answers here there has been some very good specific information supplemented tremendously by some of the written material which I have already found useful in going through it and will find useful in further work on this.

Mr. Chairman, you mentioned that Mr. Bass said one thing, I think you said "rocked you." Something else he said floored me, and if I heard you correctly, Mr. Bass, we are not only not on the same wavelength on this one point, but we are in a different dimension.

That was your final point, you said, according to information you had seen, there was really no significant cost to industry in complying with many of the recent environmental laws such as, and I presume you mean such things as in recent years the changes to the Clean Air and Clean Water Acts. You are reading from a different library than I am. I think the costs are significant in many of these areas, and the point really is not that there are offsetting increases

in other industries. Certainly whenever we pass these laws there are industries that develop, but that is not really the point, I do not think. Did I hear you wrong?

Mr. BASS. No, you did not hear me wrong, Mr. Barr.

Mr. BARR. We are on different dimensions.

Mr. BASS. The reason I brought it up almost in the context of a non sequitur was to specifically point out that what we have most often heard is the cost impact to individual companies, or even potentially to the particular sector. And there is no doubt that that is true.

What some have done is looked at the macroeconomic impacts. The study I am referring to, that just came out not more than a few months ago from the Economic Policy Institute, looks at the macroperspective and then breaks it down into subareas, and precisely as you are indicating, there was enormous impact in subsectors. Sub, that is, not some subsectors. However, when the overall macropicture was brought out, it saw virtually no change. And, in fact, it actually created slightly more jobs, although it was an insignificant amount.

The reason for this is, that with any regulation, such as the notion of trying to get rid of the ozone depleters, alternative technologies and businesses are developed in order to comport with those new requirements. So in another area it does generate jobs.

What I think is important and, therefore the reason I brought it up was not to debate whether a regulation costs money. Of course it does. I wanted to keep it in the context of what impact it has on the overall economy, especially since numbers have been thrown out willy-nilly, 500 billion, 600 billion. They come out all the time. So that is why I brought it up.

And I recommend that you take a look at the study. I think you might find it illuminating.

Mr. BARR. If you would like to send it to me, I will look at it. I think that some very learned people have come up with the figures, such as some of those that were in the panel preceding you and I would not denigrate them by saying they throw them out willy-nilly. I think they have been arrived at those numbers through careful study of the cost of these regulations. And I very strongly continue to disagree with you. I have seen some other studies that indicate there are very significant costs with very little, in some instances, no real benefit on the other side. But I certainly would be happy to look at that document, if you would send it to me.

Mr. BASS. I would be happy to.

Mr. FREEMAN. I would like to make one point on that. I was involved indirectly in the representation of utility industry in the recent rulemaking that both Mr. Hawkins and Boyden Gray referred to on emissions trading for compliance with the Clean Air Act amendments that required the electric utility industry to cut down on SO<sub>2</sub> emissions and nox emissions from powerplants. One of the reasons that that rulemaking produced satisfactory results from the point of view of the industry regulated was, first of all, you had the augmented procedures of administrative law that are in the Clean Air Act to supplement the Administrative Procedure Act. Those procedures are not in the Administrative Procedure Act and

thus are not applicable to other agencies. So you have a much better record. Rulemaking procedures were close to what was envisioned for everybody in S. 1080. Second, you did have regulatory review. You did have a cost-benefit analysis of those alternatives and a cost-effectiveness analysis. Just the kinds of things we are trying to talk about here. So it shows cost-benefit analysis, inter-agency review, works and you can get good decisions out of it. That is an example of what we should be doing more of.

I contrast that with a statute like the Superfund Act, which the EPA has chosen to administer that statute on a sort of ad hoc basis. When it issues its rules, it issues them in the form of guidance, not proposed rules that go through this process. You get totally different kind of dollars involved there, and I will be willing to bet you that most of those dollars are not needed to do what should be done.

Mr. BARR. Thank you. Thank you, Mr. Chairman.

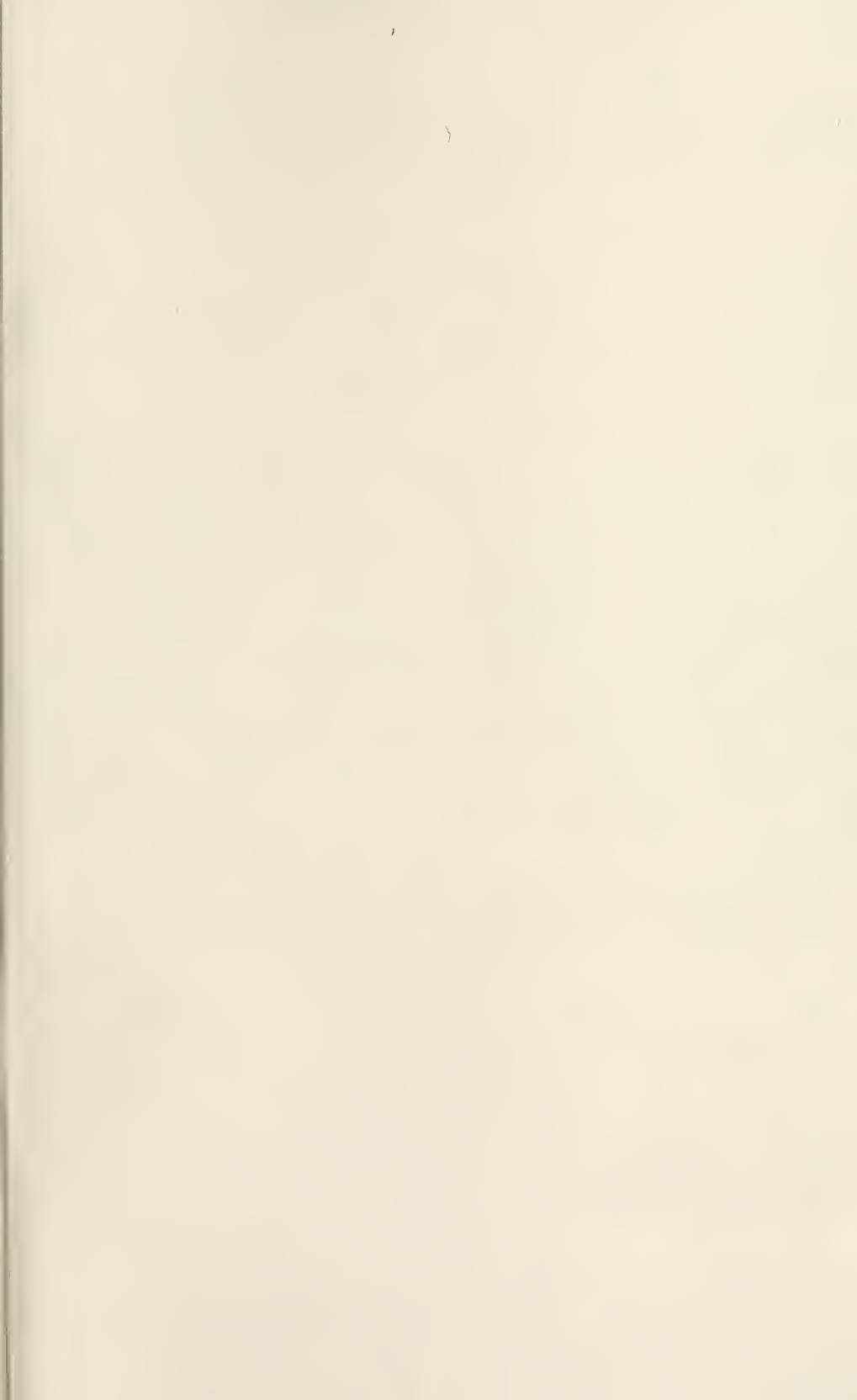
Mr. GEKAS. Well, we thank you.

Mr. REED. Mr. Chairman, may I speak out of turn for a moment, and thank you, and commend the staff particularly, for setting up these hearings. They have been most informative, most fair, and appreciate your cooperation and it is a good way to begin. Thank you, Mr. Chairman.

Mr. GEKAS. We thank the gentleman. We have more to do and we are extremely grateful to the panel for giving us additional headaches. No, but we do appreciate it. Thanks very much. The subcommittee stands adjourned.

[Whereupon, at 5:55 p.m., the subcommittee adjourned.]





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